86-307 (2)

Supreme Court, U.S.
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NO. 86-

IN THE

Supreme Court of the United States

October Term, 1986

CITY OF PADUCAH: JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.;
BELTLINE NEWS AND ARCADE CLUB,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF PADUCAH: JOHN K. PENROD, as Mayor , and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof.

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.;
BELTLINE NEWS AND ARCADE CLUB,

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondents, Investment Entertainment, Inc., and Beltline News and Arcade Club, respectfully submit that the Petition for Writ of Certiorari to review the Opinion sub judica of the Circuit Court of Appeals for the Sixth Circuit in the subject cases, to-wit: No. C83-0217-P(J) City of Paducah v. Investment Entertainment, Inc. removed from McCracken (County, Kentucky) Circuit Court and civil rights actions

Investment Entertainment, Inc. No. 85-5092 and Beltline News and Arcade Club, No. 85-5093 v. City of Paducah, et al, entered on May 28, 1986, should be denied.

JURISDICTION

Petitioners' recitation of the proceedings in the District Court and Court of Appeals for the Sixth Circuit is substantially correct except:

The cited case of State of Idaho ex rel. Kidwell v. U.S. Marketing, 102 Idaho 431, 631 P.2d 622 (1981), appears to be in conflict with the opinion of the Court of Appeals filed herein on May 28, 1986. However, this jurisdictional ground urged by Petitioners for granting the Writ is attenuated by Kentucky's own interpretation of a similar ordinance in Hall v. Commonwealth ex rel. Shroering, Ky. 505 S.W.2d 166 (1974) rendered by Kentucky's court of last resort. Hall, supra, placed narrower limits upon the injunctive relief available to regulate pornography than does Idaho in State of Idaho, supra.

And, Arcara, District Attorney of Erie County v. Cloud Books, Inc., etc., ___U.S.___, 54 L.W. 5060, 106 S.Ct. 3172 (1986) cited by the Petitioners is not dis-

positive of any issue raised in the Petition for Writ of Certiorari. (Houses of prostitution as such may be shut down though also containing a bookstore.).

CITY ORDINANCE INVOLVED

The subject ordinance of the City of Paducah, as well as all other references used by Petitioners, is likewise referenced in the Appendix to this brief, as well as two additional documents, to-wit: Memorandum in Support of City of Paducah Motion for Summary Judgment (Appendix "I") and Brief for City of Paducah, et al filed in the Court of Appeals for the Sixth Circuit (Appendix "J").

STATEMENT OF THE CASE

On June 14, 1983 the Petitioner, City of Paducah, acting through its commissioners and mayor (who are also nominal parties to this suit) enacted the subject ordinance set forth in Appendix "C". On August 3, 1983, following a public hearing, Paducah adopted a resolution that suit be filed, pursuant to said ordinance, against the Respondents in McCracken Circuit Court. One of these suits, that one naming Investment Entertainment, Inc., was successfully removed to Federal District Court upon grounds of diversity of cit-

izenship. The other remains pending in State Court. Both Beltline and Investment, Respondents to the instant Motion, filed suits against Paducah, et al pursuant to 42 U.S.C. § 1983.

In response to the federal suits, Paducah and the other movants pleaded a number of defenses including abstention. Thereafter all parties, including Paducah, moved for Summary Judgment. In its Motion and supporting Memorandum, (Appendix "I"), Paducah sought only a judgment on the merits of its claim that the subject ordinance was constitutional. The District Court was not asked to address the question of whether abstention was appropriate nor whether the ordinance should be construed initially by a State Court. Paducah lost and Beltine and Investment won in the District Court, and a permanent injunction was entered against Paducah on First Amendment grounds, the only grounds presented. Paducah appealed.

In seeking relief on appeal before the Court of Appeals for the Sixth Circuit, Paducah's sole ground urged for reversal was the Constitutional validity of the ordinance. Again, Paducah was silent on the issues of abstention or construction of the subject ordinance

by State Courts.

The Court of Appeals affirmed the District Court's holding that the subject ordinance, on its face, establishes a prior restraint of protected speech. Paducah now seeks a Writ of Certiorari from this Court.

ARGUMENT I

PADUCAH HAS WAIVED THE DEFENSE OF ABSTENTION

Paducah is asking this Court for relief under the abstention doctrine. In effect, this Court is being asked to consider a case almost completely different from that presented to the District Court or Court of Appeals. It is fundamental that defenses may not be raised for the first time on appeal. E.g. United States v. Estate of Donnelly, 397 U.S. 286 (1970). Moreover, it is difficult to apprehend just how a State Court's construction of the statute might differ from the one given by the District Court. Although Paducah argues vigorously for the principle of State Court construction, the only specific point on which it claims a potential construction contrary to the one given below, is the possible severability

of the license revocation provision. (Petition p. 52-53). Paducah does not say how this would render the balance of the ordinance valid and it is difficult to see how it could be.

For reasons stated hereinafter, it is unlikely that Kentucky's construction of the ordinance would differ from that of the District Court.

ARGUMENT II

THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY HELD THE PADUCAH ORDINANCE ESTABLISHES A PRIOR RESTRAINT ON PROTECTED SPEECH

The main thrust of Paducah's argument before the Court of Appeals (Appendix "I") was that the sanctions for violating the ordinance were less onerous than for violating Kentucky's penal statutes proscribing dissemination of obscenity (KRS 531.020) which could include incarceration. Penal statutes against pornography do not, of course, restrict the dissemination of protected materials. Miller v. California, 413 U.S. 15 (1973).

Although it was not argued in the Court of Appeals as a reason for affirmance (abstention having not been raised) there is an additional reason for affirming the judgment below. California Bankers Ass'n. v.

Shultz, 416 U.S. 21 (1974). That is, Kentucky's court of last resort (the former Court of Appeals) had already placed a narrow construction on similar efforts to enjoin the dissemination of pornography in the City of Louisville. Hall v. Com. ex rel. Shroering, Ky 505 S.W.2d 166 (1974). In Hall, supra it was held that the defendants d/b/a "Adult News" could be enjoined from violating obscenity statutes and punished for contempt. However, the trial court's order was overbroad in ordering that defendants be permanently enjoined from selling, drawing, giving away, etc. at any location in city or county, any film or any written or printed material.

CONCLUSION

For the reasons and upon the authorities cited hereinabove, Respondents respectfully move that the Petition for Writ of Certiorari be denied.

CERTIFICATE OF SERVICE

I, hereby certify that on this 25th day of September, 1986, the original and 40 copies of the within Response to Petition for Writ of Certiorari were deposited in the United States Post Office in Paducah, Kentucky, postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaied, to the below-listed parties to the proceedings and that all parties required to be served have been served.

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APPENDIX "A"

Opinion of the United States Court of Appeals for the Sixth Circuit in City of Paducah v. Investment Entertainment, Inc., et al., and Investment Entertainment, Inc., (No. 85-5092) Beltline News and Arcade Club, (No. 85-5903) v. City of Paducah et al., Nos. 85-5092, 85-5093 decided May 28, 1986.

(Reference: Petition for Writ of Certiorari at page 2, line 15; page 20, line 19; page 21, line 16).

....A-1 thru A-40

Nos. 85-5092, 85-5093

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CITY OF PADUCAH, Plaintiff-Appellant, v. INVESTMENT ENTERTAINMENT, INC., et al., Defendants-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
INVESTMENT ENTERTAINMENT, INC., (NO. 85-5092). BELTLINE NEWS AND ARCADE CLUB, (NO. 85-5093). Plaintiffs-Appellees. v. CITY OF PADUCAH, et al., Defendants-Appellants.	

Decided and Filed May 28, 1986

Before: MERRITT and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

MERRITT, Circuit Judge, delivered the opinion of the court in which CELEBREZZE, Senior Circuit Judge, joined. WELLFORD, Circuit Judge (pp. 16-18), delivered a separate concurring opinion.

MERRITT, Circuit Judge. The City of Paducah, Kentucky, appeals the judgment of District Judge Johnstone that Paducah's obscenity abatement ordinance, on its face, establishes a prior restraint of protected speech and thereby unconstitutionally infringes the first amendment rights of plaintiffs Investment Entertainment, Inc. and Beltline News and Arcade Club, sellers of books, magazines, and video tapes. We agree that the ordinance's provision requiring the revocation of the occupational licenses of booksellers and move theatres dealing in obscenity renders the ordinance invalid.

I.

On June 14, 1983, the City of Paducah enacted an ordinance to control obscene material as defined in Miller v. California, 413 U.S. 15 (1973). Relying on the city's power to declare and abate public nuisances, the ordinance defines the following as "public nuisances per se" in Paducah: (1) any place where obscene films are publicly exhibited or possessed for exhibition in the regular course of business; (2) any obscene film so exhibited or possessed; (3) any place of business, or portion thereof, where obscene publications constitute a principal part of the stock in trade of the business; and (4) any obscene publication possessed at such a place. The ordinance also defines as "a public nuisance per accidens" all money or other consideration received for the exhibition or sale of such obscene films

or publications after the manager of the business receives certified notice of the initiation of proceedings under the ordinance.

The key contested provision of the ordinance states that the Paducah Board of Commissioners, upon a specific finding that a public nuisance exists, shall by resolution order a revocation of all licenses and permits that have been issued to the business maintaining the nuisance. This license revocation is subject to judicial confirmation.

The Board must then order counsel for the city to bring a civil action against the public nuisance. In addition to license revocation, the ordinance contemplates that the action will seek an order enjoining all persons maintaining the nuisance from possessing or marketing the obscene films or publications at any time in the future,

an accounting of all money received in the obscenity business, forfeiture of the obscene materials and the money, and judgment for the city for all costs expended in abating the nuisance. The ordinance provides that the "cost of abatement," which is defined to include investigative costs, court costs, reasonable attorney fees, and printing costs for any trial and appeal, is to be a special assessment against the parcel of land upon which the public nuisance is maintained, but only against the interests of the individuals responsible for maintaining the nuisance. This special assessment is to be collected and enforced by the same means as used for ordinary local property taxes.

In June and July of 1983, Paducah police officers purchased obscene magazines and video tapes from businesses operated in Paducah by

Investment and Beltline. Counsel for the city wrote a letter to both informing them of the ordinance and of the material purchased by the police officers. The letter gave them notice that public hearings would be held. In August 1983, after a hearing, the Board adopted a resolution finding the material purchased from Investment to be obscene and declaring the business from which the material was purchased to be a public nuisance. In September 1983, the Board adopted a similar resolution concerning Beltline. Thereafter, counsel for the city initiated civil actions in Kentucky state court seeking abatement of the nuisances as provided by the ordinance.

Investment and Beltline brought separate suits in the United States District Court for the Western District of Kentucky, both under 42 U.S.C. § 1983

(1982), seeking to have the ordinance declared constitutionally invalid and to have the city enjoined from enforcing the ordinance. Alleging diversity of citizenship, Investment removed the state court enforcement action pending against it to federal district court. Beltline also attempted to remove the enforcement action directed against it to federal court, but removal was denied because there was no diversity of citizenship. The District Court then consolidated all three actions. The parties have raised no issue concerning abstention in the District Court or this Court.

Neither Investment nor Beltline challenged the ordinance's definition of obscenity, and both admit that the material seized is obscene within the Miller v. California definition. The District Court granted their motions for

summary judgment. It held that because the ordinance's license revocation procedure could result in closing down an entire place of business even though not all the material was obscene, the abatement procedure amounted to a prior restraint of both protected speech and unprotected speech. Judge Johnstone gave this example: Under the ordinance, a movie theatre could be closed for repeatedly showing an obscene film on weekends even though the theatre showed "The Ten Commandments," "Snow White," and "Gone With the Wind" on week days. The District Court also held that the ordinance's abatement procedure unconstitutionally encouraged businesses to engage in self-censorship because the threat of having an entire place of business "abated" would induce business operators to avoid questionable, but still protected, films and publications.

The District Court ruled that this self-censorship arises from the ordinance's use of undefined terms such as "regular course of business," "repeatedly," and "principal part." The court held that in this respect the ordinance was vague and would give business operators no notice of what conduct the ordinance reached.

II.

The ordinance requires the revocation of the business licenses of distributors and exhibitors of obscene material. It therefore restrains future speech of the booksellers and theaters whose licenses are revoked--both obscene and decorous speech. The main issue presented is whether Paducah may use license revocation as a tool to control obscenity.

The problem of using licensing to control distribution of printed

expression by booksellers and publishers has a long history. Milton's Areopagitica remains the classic argument against the licensing of speech. Writing in 1644, just after the revolution, in response to a parliamentary law reestablishing the use of licensing to control books, Milton takes as his "task...to show that no...well instituted state, if they valued books at all, did ever use" "this authentic Spanish policy of licensing books." He argues instead that "the timeliest and most effectual remedy" is subsequent evaluation and seizure if necessary. Among his many arguments, Milton advances the danger to truth and beauty because they are difficult to distinguish from falsity and ugliness (however "much we thus expel of sin, so much we expel of virtue, for the matter of them both is the same") and the

problem of the "quality which ought to be in every licenser" ("he who is made judge to sit upon the birth and death of books...had need to be a man above the common measure, both studious, learned, and judicious." Yet, "there cannot be a more tedious and unchosen journeywork...than to be made the perpetual reader of unchosen books and pamphlets"). Licensing speech discourages new ideas ("I found and visited the famous Galileo, grown old, a prisoner to the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought"); undermines expression as a value in itself ("[g]ive me the liberty to know, to utter, and to argue freely according to conscience, above all liberties"); and raises the prospect of manipulation and misinformation when we "pretend to bind books to their good

behavior" ("for what magistrate may not be misinformed, and much the sooner, if liberty of printing be reduced into the power of a few?").

By the late Eighteenth Century, Milton's view against licensing had become the English common law rule against prior restraint, as reflected in Blackstone's Commentaries:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications....To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points of learning, religion, and government.[1]

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[1] 4 W. Blackstone, Commentaries *151-52 (emphasis in original). Blackstone described the history of printer licensing in England:

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The British common law against licensing publishers and booksellers was part of the foundation for the first amendment's guarantee of freedom of the press. See Z. Chafee, Free Speech in the United States 10-12 (1942) (arguing that the Blackstonian view of freedom of the press--freedom from prior restraint--was part, but only part, of the freedom that the first amendment had come to guarantee).

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The art of printing, soon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I, after

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III.

Modern first amendment jurisprudence has followed Milton and Blackstone on prior restraint. As the District Court noted, that law has dealt with the licensing problem by

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their rupture with that prince, assumed the same powers as the starchamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652, (Scobell. i. 44, 134, ii. 88, 230.) issued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33. which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute I. Jac. II. c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24, but, though frequent attempts were made by the government to revive it, in the subsequent part of that reign, (Com. Journ. 11 Feb. 1694, 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697, 31 Jan. 1698.) yet the parliament resisted it so strongly, that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

Id. at *152 n.2.

focusing on whether the use of licensing constitutes a prior restraint of protected expression. The major case on prior restraint is Near v. Minnesota, 283 U.S. 697 (1931). In Near the Court invalidated, as a prior restraint, an injunction entered against a newspaper under a Minnesota statute providing that any newspaper publishing malicious, scandalous, or defamatory material is a nuisance and can be permanently enjoined. Chief Justice Hughes, quoting Blackstone, pointed out that part of the first amendment grew out of the struggle in Britain against the "legislative power of the licenser" of the press. Id. at 713-14. The Court held that if "the object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical" in the future, and "the statute not only operates to suppress

the offending newspaper or periodical but to put the publisher under an effective censorship." 283 U.S. at 709-12, then the statute constitutes a prior restraint.

The City of Paducah's argument that its licensing ordinance is not a prior restraint is similar to Justice Butler's argument for the four dissenters in Near, Paducah, one might argue, is only revoking a previously issued business license, and when the licenses are issued they are completely unrelated to the regulation of speech. Later revocation is for abuse of the occupational license.

Likewise, Justice Butler argued that prior restraint consists of licensing publishers and their books as an original matter, not of later revocation for abuse of the right. Later revocation "does not operate as a

previous restraint on publication within the proper meaning of that phrase" because it "is only in respect of continuing to do what has been duly adjudged to constitute a nuisance." Id. at 735 (emphasis in original). "It is fanciful to suggest similarity between...the decree...to prevent further publication of malicious, scandalous, and defamatory articles and the previous restraint upon the press by licensers as referred to by Blackstone...." Id. at 736 (emphasis in original). Chief Justice Hughes and the majority of the Court rejected this argument--"that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes"--dereliction because "[the argument] is inconsistent with the reason which underlies the privilege." Id. at 720-21.

Several federal and state courts have addressed the first amendment question presented by state laws and local ordinances that use the nuisance abatement power to control obscenity. Laws on this subject differ in approach. Some, as in the instant case, abate the nuisance by revoking the offending business' general business license. Others, the so-called "padlock" laws, call for a judicially ordered temporary or permanent injunction under which local authorities close the place of business and do not allow its owners to operate out of that location for the duration of the injunction.

We have found no precedent in which courts have upheld an obscenity law that provided for the revocation of obscenity dealers' business licenses. In at least three instances, federal courts have held local obscenity ordinances that use

the revocation of licenses and permits to be unconstitutional prior restraints of protected speech. Gayety Theatres, Inc. v. Miami, 719 F.2d 1550 (11th Cir. 1983); Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980); cert. denied, 450 U.S. 919 (1981); Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777 (D. Utah 1980); see also Genusa v. City of Peoria, 619 F.2d 1203, 1213-15 (7th Cir. 1980) (requirement that adult bookstore license applicant submit to inspection of premises was held unconstitutional). But cf. Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976) (adult movie theatres may be licensed if licensing is necessary to valid zoning and locational requirements); Genusa, 619 F.2d at 1212-13 (same for adult bookstores).

The Supreme Court has not ruled directly on the licensing issue in an obscenity case.

The padlock cases are also pertinent, although not directly on point. The results in the padlock and other similar cases have varied. The Supreme Court has never ruled on the question of whether a padlock obscenity law is an unconstitutional prior restraint.[2] Because this is a license revocation ordinance case, we need not give an opinion on the padlock laws which are usually less intrusive than license revocation. But a review of a few of the cases is instructive.

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[2] See Avenue Book Store v. City of Tallmadge, 459 U.S. 997, 998 (1982) (White, J., dissenting to the Supreme Court's denial of certiorari, quoted infra note 3).

In Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978), the Fifth Circuit held that a nuisance statute's provision for temporary closure of businesses distributing obscene material was an unconstitutional prior restraint of business operators' rights to engage in protected expression during the closure period. The Supreme Court affirmed at 445 U.S. 308 (1980), but, in affirming, the Court aimed its per curiam opinion at the fact that under the statute a prosecutor could obtain a temporary restraining order and preliminary injunction against showing certain named and unnamed films before judicial determination that the films were indeed obscene. 445 U.S. at 316 n. 14. The Court held that this procedure was an unconstitutional prior

restraint.[3] Several other courts have held padlock obscenity laws invalid. See Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777

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[3] See Justice White's dissent in which he argues that the Court misunderstood the statute's provision dealing with an injunction to be issued after judicial determination that the material involved was obscene. 445 U.S. at 320-25. See also the dissent to the Supreme Court's denial of certiorari in Avenue Book Store in which Justice White states:

> In Vance v. Universal Amusement Co., 445 U.S. 308 (1980), the Court upheld a finding that a Texas public nuisance statute authorized an unconstitutional "prior restraint for indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity." Id. at 309. Fatal to that statute were particular procedural infirmities of the Texas nuisance scheme whereby the subject of an abatement order or injunction "would be subject to contempt proceedings even if the film [was] ultimately found to be nonobscene." Id. at 316.

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(D.Utah 1980); People ex rel. Busch v. Projection Room Theatre, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600, cert. denied sub nom., Van De Kamp v. Projection Room Theatre, 429 U.S. 922 (1976); State v. A Motion Picture Entitled "The Bet", 219 Kan. 64, 547 P.2d 760 (1976); see also Note, Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power, 58 N.Y.U.L. Rev. 1478, 1489 (1983) ("courts generally have assumed that padlock orders are

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> The Court has never determined however, whether abatement orders, such as the one involved in the present case, will pass constitutional muster when they permanently enjoin the use of a business premises for the sale or display of obscene material, but do not subject the owner to contempt sanctions unless there has been a judicial determination of obscenity.

prior restraints without engaging in substantial analysis under prior restraint doctrine.").[4]

On the other hand, several state courts have held that padlock laws aimed at businesses involved in the sale or exhibition of obscene material are not prior restraints. In State ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 631 P.2d 622 (1981), appeal dismissed sub nom., U.S. Marketing, Inc. v. Idaho, 455 U.S. 1009 (1982), the Idaho Supreme Court dealt with a state

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[4] Accord J.R. Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985). In Eikenberry the Ninth Circuit stated as dictum (see 105 S.Ct. at 2797 n.5; 725 F.2d at 498 (Wallace, J., dissenting))that an obscenity abatement law's provision requiring forfeiture of profits derived from the sale of both obscene and nonobscene material unconstitutionally restricted free speech rights in the nonobscene material.

nuisance law providing that if a business is engaged in selling or exhibiting obscene material, the real property used in the business is forfeited for a period of one year. The defendant argued that this forced forfeiture constituted an unconstitutional prior restraint on business operators' first amendment rights to engage in protected, nonobscene expression. The court noted that under Roth v. United States, 354 U.S. 476 (1957), the state could punish purveyors of obscene material and that the state was not limited to criminal sanctions as a weapon against obscenity. Kingsley Books v. Brown, 354 U.S. 436, 441 (1957). The court held that the purpose of the nuisance law was to deter dealing in obscenity, and, in response to the prior restraint argument, it stated:

> By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint upon his bookselling activities. If that same bookseller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it has that effect.
>
> * * *
>
> The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particularly noxious specter of content control. Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The legislature could just as easily have imposed a fine or other property-related penalty. Instead, the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation.

631 P.2d at 627-28.

Under this line of analysis, similar to Justice Butler's argument in dissent in Near, if the nuisance abatement procedure is seen as a means of deterring or punishing purveyors of obscene material, preventing a business operator from selling or exhibiting any publications or films in the future is no more of a prior restraint than closing his business for drug or weapons violations would be. Along these lines see State ex rel. Calahan v. Diversified Theatrical Corp., 59 Mich.App. 223, 229 N.W.2d 389 (1975), rev'd on other grounds, 396 Mich. 244, 240 N.W.2d 460 (1976).

IV.

As noted by the Idaho Supreme Court in Kidwell, not all laws that have the effect of preventing a person from engaging in protected expression in the future are prior restraints as that term

has been developed. Assuming a valid statute, the state of Kentucky could incarcerate a person who is properly convicted of violating Kentucky's obscenity statute. See Ginzburg v. United States, 383 U.S. 463 (1966) (upholding conviction for violation of federal obscenity statute; defendant had been sentenced to serve five years) and Ky. Rev. Stat. § 531.020 (1985) (distributing two pieces of obscene matter is a class A misdemeanor in Kentucky, which may result in imposition of up to a one-year jail sentence). If a bookstore operator were convicted for selling obscene material in his store and were sentenced to serve time in the state prison, his ability to continue to personally sell nonobscene books in his store would be foreclosed for the duration of his incarceration. But it

is doubtful that he could make a valid argument that the state law under which he was incarcerated is a prior restraint of his right to engage in protected expression by selling nonobscene books.

Similarly, it is doubtful that he could make a valid argument that a nuisance abatement law applied to obscenity is an unconstitutional prior restraint if the law is narrowly structured as a deterrent or punishment of purveyors of obscenity. If, on the other hand, the abatement procedure focuses on regulating the future speech of a defendant who has been adjudged "guilty" of distributing obscene material, the law is tantamount to a licensing statute establishing a prior restraint of the defendant's first amendment right to engage in nonobscene expression. To use the language of Near

v. Minnesota, a nuisance abatement procedure applied to obscenity should be upheld if "[t]he object of the [procedure] is punishment, in the ordinary sense, [rather than] suppression of the offending [business]" and if the procedure does not "operat[e] to...put the publisher under an effective censorship." 283 U.S. at 709-12.

No doubt one of the purposes of Paducah's license revocation ordinance is to deter the sale and exhibition of obscene material. But the ordinance goes beyond this purpose as District Judge Johnstone found. The main thrust of the abatement procedure is the revocation of all licenses and permits under which the business in question operates. Even under the so-called padlock laws, a business operator remains free to engage in protected

expression in another location. Paducah's procedure of revoking business licenses is more restrictive in that it essentially prevents the offending business from engaging in future distribution of protected, nonobscene material anywhere within the City of Paducah. We therefore conclude that the ordinance's use of license revocation as a weapon against obscenity goes beyond merely deterring or punishing individuals who deal in obscene material. The ordinance's purpose, as evidenced by the license revocation provision, is to control future expression by businesses that have been subjected to the nuisance abatement procedure. The ordinance is a prior restraint of plaintiff's freedom of expression.

Of course, not all prior restraints of free speech are unconstitutional.

But none of the exceptions are present here. In order to be valid, a system imposing a temporary prior restraint must implement certain procedural safeguards required by Supreme Court precedent. These safeguards are drawn from Freedom v. Maryland, 380 U.S. 51 (1965), and more recently from Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975), in which the Court stated:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

As to the obscene material whose sale or exhibition triggered the application of Paducah's ordinance, the

safeguards are adequate. Or, more accurately, there is no restraint at all before a judicial hearing is conducted, since the sale and exhibition of the material is not restrained until after a judicial determination that the material is indeed obscene.[5] As discussed above, however, the license revocation procedure would still operate as a prior restraint on plaintiffs' future distribution of nonobscene expression.

---

[5] The parties have not argued the possibility that in an enforcement action Paducah might obtain, under Kentucky state court procedures, a temporary restraining order directed at allegedly obscene material before the material had been judicially adjudged obscene. We note that the majority of the Supreme Court spoke to such a procedure in Vance v. Universal Amusement, 445 U.S. 308 (1980), but that is not an issue here.

Neither the parties nor the District Court has addressed the possibility that the ordinance's unconstitutional use of license revocation may be severable from the remainder of the ordinance. In the absence of argument on the issue, we also decline to address the severability question. The ordinance violates plaintiffs' first amendment right of freedom of expression. Accordingly, we hold the ordinance facially invalid, and we affirm the District Court's judgment.

WELLFORD, Circuit Judge, concurring.

The City of Paducah originally sought to enforce the ordinance in question against Beltline News and Arcade Club (Beltline) and against the other defendant, Investment Entertainment, Inc. (Investment), in state court. The action against the

latter was successfully removed by Investment to federal district court, but the other is pending against Beltline in state court. The defense of abstention was presented by the City in its answer to Investment's complaint and amended complaint in the district court. This is the kind of factual situation in which abstention may be appropriate because the ordinance's scheme contemplates a full state court hearing before revocation of defendants' operating licenses and privileges becomes effective. State courts are fully competent to hear and to consider the constitutional challenges, federal and state, here made to the procedures involved in the disputed ordinance. The state court, of course, may first test the ordinance and its procedure under standards of the Kentucky Constitution; accordingly, it might

avoid the necessity of a decision on the federal Constitution in a complex and difficult area.

> Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between the two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions.

Martin v. Creasy, 360 U.S. 219, 224 (1959).

In Martin, the Court noted that the Pennsylvania law challenged as unconstitutional had not yet been construed by state courts, and there was "no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope...." Id. at 225. This case would have been an appropriate vehicle for abstention since the district court might have awaited a decision of the state court in Beltline before deciding the sensitive

federal constitutional issue in Investment. However, because the City did not actively pursue the abstention issue before this court and has apparently not urged the state court promptly to render a decision in Beltline, this issue has been waived, although initially suggested by the City in its answer to the federal action. See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479-80 (1977).

The difficulty in this area of the law is well expressed in the various viewpoints of the Justices set out in Vance v. Universal Amusement Co., 445 U.S. 308, 320 (1980). Perhaps the Supreme Court will determine whether an abatement or revocation of the kind contemplated in the Paducah ordinance will pass constitutional muster in deciding the case now pending before it for disposition. People ex rel. Arcara

v. Cloud Books, Inc., 119 Misc.2d 505, 465 N.Y.S.2d 633, later proceeding, 96 A.D.2d 751, 465 N.Y.S.2d 699 (1983), aff'd, 101 A.D.2d 163, 475 N.Y.S.2d 173 (1984), certified question answered and modified, 65 N.Y.2d 324, 491 N.Y.S.2d 307, cert. granted, 106 S.Ct. 379 (1985).

I emphasize, on the merits of this case, as found by Judge Merritt, that the procedural safeguards of the Paducah ordinance appear to be adequate solely in respect of the allegedly obscene materials because there is no prior restraint involved with regard to any claimed first amendment freedom of expression until after a judicial determination has been made on obscenity. It is the future effect of revocation of an operating license, the remedy that is provided, that is especially troublesome in this case.

We have recently stated with respect to a city ordinance dealing with an effort to control what was deemed to be potential obscene conduct in licensed clubs through revocation of an occupational license:

> We hold further that the ordinance does not constitute an impermissible prior restraint upon either present or future restricted expression. The appellants' argument that their zoning status would be altered if their occupational licenses were revoked does not constitute a reason to invalidate the ordinance as a prior restraint. In this case, prescreening discretion is not vested in any administrative body, as in Near v. Minnesota, 283 U.S. 697 (1931), and the dangers of censorship are not present.

Iacobucci v. City of Newport, Ky., 785 F.2d 1354, 1359 (6th Cir. 1986) (emphasis added).

I do not harbor the serious reservations of Judge Merritt that obscenity ordinances may not, under any circumstances, validly revoke a business

license of one dealing in obscenity, properly defined, in a particular location. A permanent revocation of license may be too broad a sanction in the situation before us. I have no problem, as did the district court, with the words "regular course of business" and "repeatedly" as used in the ordinance in question. I do not find them "vague" or overbroad, examined in context with their use in the ordinance.

I concur in the result reached by Judge Merritt in this case. I do not, however, adopt the rationale of J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984), rev'd on other grounds sub nom., Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985).

APPENDIX "B"

Opinion of the United States District Court, Western District of Kentucky at Paducah, Kentucky in City of Paducah v. Investment Entertainment, Inc., and Showtime Entertainment, Inc., Civil Action No. 83-0217-P(J), Consolidated with Investment Entertainment, Inc. v. City of Paducah, et al., Civil Action No. 83-0208P(J).

(Reference: Petition of Writ of Certiorari at page 2, line 12; page 14, line 14; page 19, lines 12 and 14).

....B-1 thru B-19

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CITY OF PADUCAH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 83-0217-P(J)
INVESTMENT ENTERTAIN-	)	
MENT, INC., and SHOW-	)	
TIME ENTERTAINMENT,	)	
INC.,	)	
	)	
Defendants.	)	
	)	
CONSOLIDATED WITH:	)	
	)	
INVESTMENT ENTERTAIN-	)	
MENT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 83-0208-P(J)
CITY OF PADUCAH,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

These consolidated actions concern the constitutionality of Ordinance No. 83-6-2388 of the City of Paducah. The litigation was initiated in this court on August 3, 1983, with Investment

Entertainment, Inc. seeking a declaration that the ordinance was unconstitutional and a permanent injunction preventing the City from proceeding against Investment under the provisions of the ordinance. Investment's action was subsequently consolidated with an enforcement action brought against Investment in state court, and removed by Investment to this court. Investment's defense and counter-claim in the removal action are essentially the same as its claim in the original action, i.e., that the ordinance is unconstitutional and violates its rights under the First and Fourteenth Amendments to the United States Constitution. Investment's original action also presents a claim under 42 U.S.C. § 1983. Showtime Entertainment, Inc. was added as a party when it was learned that Showtime might

have an interest in the property involved in the enforcement action against Investment. (For convenience this opinion will refer only to Investment; however, the court's decision will also apply to Showtime).

Jurisdiction over Investment's original action exists under 28 U.S.C. Sections 1331, and 1343(3). Jurisdiction over the removal action exists under 28 U.S.C. § 1332, through the provisions in 28 U.S.C. § 1441. These matters are now before the court on cross motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Ordinance No. 83-6-2388 was enacted on June 14, 1983. It deals with the sale and exhibition of obscene materials, and attempts to prohibit sales and exhibitions through the City's power to declare and abate public

nuisances. The ordinance declares the following to be public nuisance per se:

(A) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition.

(B) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibition, or possessed for the purpose of such exhibition; and

(C) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.

City of Paducah, Ordinance No. 83-6-2388, Section 19-152. Also declared a public nuisance are:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such

> place or places constitute the public nuisance which requires abatement; and
>
> (B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

id. at Section 19-153. Additionally, the ordinance provides that once a certified copy of the ordinance and a certified copy of the resolution required under the ordinance have been served on the place in question, or on the persons responsible for the place, all monies paid as admission to the obscene exhibitions and all valuable consideration received for the sale of the obscene publications shall also be regarded as public nuisances. Id. at Sections 19-152 and 19-153.

The ordinance also prescribes procedures for identifying and abating the nuisances. The City's Board of Commissioners must initially make a

specific finding that a public nuisance exists. Id. at Section 19-155. Once this is determined, the Board, in order to implement the provisions of the ordinance, must pass a detailed resolution. The resolution must declare that a nuisance exists, describe its location, and set forth the facts on which the nuisance determination was based. Id. It must order that all operating licenses and permits associated with the declared nuisance be revoked (subject to confirmation by mandatory judicial proceedings), that the nuisance be abated, and that specific notice be given to those persons deemed to have knowledge of the nuisance. Id. The resolution must also order the Corporate Counsel to initiate judicial proceedings to abate the nuisance. Id. The judicial proceedings are to be initiated within five working

days after passage of the resolution. Id. at Section 19-156. In those proceedings, the Corporate Counsel must seek a court order that the materials in question are obscene, that the places in question are public nuisances, and that the Board's action in revoking the operating licenses and permits was lawful. Id. The Ordinance also directs the Corporate Counsel to seek an injunction against the persons maintaining the nuisance, enjoining them from selling or exhibiting the materials declared to be obscene and from possessing the materials for purposes of sale or exhibition. Finally, the Corporate Counsel must seek an order of forfeiture against the obscene films and publications, and all monies determined by the court to have been received through their exhibition and sale. Id.

On August 3, 1983, the City's Board of Commissioners utilized Ordinance No. 83-6-2388 to take action against Investment. Through the required resolution, the Board declared that Investment, and all materials possessed by Investment, were public nuisances, ordered that Investment's operating licenses and permits be revoked (subject to judicial confirmation), and ordered the Corporate Counsel to initiate the necessary judicial proceedings. The Board's findings and resolution were based solely upon testimony from an undercover policeman who visited Investment on June 22, July 2, and July 10, 1983, and the Board's examination of two video tapes and two magazines purchased by the undercover policeman.

DISCUSSION

For summary judgment purposes, Investment concedes that the video tapes

and magazines examined by the Board are "obscene." Furthermore, Investment does not challenge the constitutionality of the "obscene matter" definition contained in the ordinance. Investment does contend that the provisions of the ordinance, and the actions taken against it pursuant to those provisions, violate constitutional guarantees of due process. Investment also contends that the ordinance imposes an impermissible prior restraint on speech and impermissibly punishes protected speech.

Investment's due process argument centers around procedural and evidentiary matters. Specifically, it contends that a determination that Investment and all materials possessed there are public nuisances is unconstitutional, if it is based solely upon general testimony from an officer who visited the business, and a finding

that two video tapes and two magazines purchased from the business are obscene. This argument fails to recognize that the actions taken by the Board of Commissioners had no binding effect on whether Investment, or any of the materials possessed by Investment, would ultimately be determined to be a public nuisance and subjected to closure or forfeiture. The only effect of the Board's action was the initiation of judicial proceedings against investment. The ordinance recognizes that all final and binding determinations must be made by the court involved in the judicial proceedings. Due process does not require that decisions to initiate judicial proceedings be made pursuant to some type of evidentiary standard or that they be made only after notice has been given to the affected parties. Viewed strictly as a means of

determining when to initiate judicial proceedings, the ordinance does not violate due process. See Buena Vista Cinema, 129 Cal. Rptr. 315, 318 (Cal. Ct.App. 1976).

The ordinance does not, however, serve solely as a means for determining when to initiate judicial proceedings. Indeed, although the ordinance leaves the ultimate procedural and evidentiary standards in the hands of the court conducting the required judicial proceedings, it expressly defines the property constituting a "public nuisance," thereby establishing the scope of the judicial proceedings and setting the standard for the substantive nuisance determination. Investment's prior restraint and impermissible punishment of protected speech arguments relate to these public nuisance declarations. Investment does not

contend that it is improper for the City to declare what property constitutes a public nuisance, or even that it is improper for the City to declare that obscene materials constitute a public nuisance, subject to proper procedural safeguards; however, Investment does contend that Ordinance No. 83-6-2388 declares property to be a public nuisance in a way which impermissibly punishes non-obscene, protected speech. The court agrees. Attempts to regulate obscenity must be drafted in a manner that will "ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963). Accordingly, constitutional guarantees of freedom of speech mandate that laws regulating

speech be carefully drawn so as to punish only unprotected speech and not intrude upon protected expression. Gooding v. Wilson, 405 U.S. 518, 522, 92 S.Ct. 1103, 1106 (1972). Ordinance No. 83-6-2388 intrudes upon protected speech by declaring an entire place of business to be a public nuisance upon a finding that the place publicly and repeatedly exhibits obscene films, exhibits obscene films as a regular course of business, possesses obscene films for such exhibitions, or maintains obscene publications as its principal stock in trade. See Ordinance No. 83-6-2388 at Sections 19-152 and 19-153. By focusing on the places of sale and exhibition, rather than merely upon the materials sold or exhibited, the ordinance intrudes upon protected speech. Specifically, it prevents an entire place from disseminating

constitutionally protected, non-obscene materials, simply because the place has sold or exhibited obscene materials in the past. The dangers of such a ban are readily illustrated. For example, a movie theatre that showed The Ten Commandments, Snow White, or Gone With the Wind during the week could be closed and prevented from showing any movies, if it happened to show a film each Saturday night at midnight that was ultimately determined to be obscene, assuming that once a week constitutes "repeatedly" exhibiting. Similarly, an entire book store could be closed if it sold materials later determined to be obscene, even if the store also sold The Bible, A Tale of Two Cities, and The New York Times. Such all-encompassing prohibitions directed at places of sale or exhibition are unconstitutional. See J-R Distributors, Inc. v. Eikenberry,

725 F.2d 482, 494 (9th Cir. 1984), prob. juris. noted, ___U.S.___, 105 S.Ct. 77 (1984). See also Universal Amusement Co. v. Vance, 587 F.2d 159, 165-166 (5th Cir. 1978). (en banc), aff'd. 445 U.S. 308, 100 S.Ct. 1156 (1980); People ex rel. Busch v. Projection Room Theater, 550 P.2d 600 (Cal. 1976), cert denied, 429 U.S. 922, 97 S.Ct. 320 (1976). See generally Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F.Supp. 777, 785-786 (D. Utah 1980); State v. A Motion Picture Entitled "The Bet," 547 P.2d 760 (Kan. 1976). Moreover, because the ordinance allows the entire business to be declared a public nuisance, it encourages a business person to steer wide of danger by avoiding questionable but nonetheless protected films and publications. See Vance, 587 F.2d at 166. Thus, given that the line between protected and unprotected speech is dim

and uncertain, the broad closure provision contained in Ordinance No. 83-6-2388 will result in self-censorship of protected but questionable materials as business persons avoid those materials in an effort to prevent their entire business from being declared a public nuisance. Thus, a new Ulysses might never be disseminated because of the threat of having the entire place of business closed if the questionable item was later determined to be obscene. See Vance, 587 F.2d at 156. Ordinance No. 83-6-2388 especially encourages self-censorship by its vague standards. The ordinance does not define "regular course of business," "repeatedly," or "principal part," yet it uses these terms to draw the line at where a place selling or exhibiting obscene materials becomes a public nuisance. Ordinance No. 83-6-2388 at Sections 19-152 and

19-153. There is no way that a business person could know in advance whether once-a-week or once-a-day amounted to "repeatedly" or whether two magazines or twenty magazines constituted a "principal part."

CONCLUSION

Materials which have been properly determined to be legally obscene are not within the free speech protection afforded by the constitution and, therefore, are subject to regulation. See Sullivan, 372 U.S. at 65, 83 S.Ct. at 637. Accordingly, although the issue is not squarely presented in the present case, an ordinance which focused a government's public nuisance powers solely upon obscene materials would not appear to be invalid. On the other hand, non-obscene materials are entitled to great protection, and therein lies the danger of Ordinance No. 83-6-2388.

By going beyond the obscene materials themselves and focusing on the places where the obscene materials are sold or exhibited, the ordinance improperly intrudes upon protected expression. Because of this focus on places rather than materials the court finds that Sections 19-152(A) and (B) and Section 19-153(A) are unconstitutional. See Eikenberry, 715 F.2d at 493-496, and cases cited therein; Vance, 587 F.2d at 164-166; Busch 550 P.2d at 600. The City has cited one case supporting a contrary conclusion, State ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Idaho 1981), however, the court has chosen to rely upon the cases cited above; cases which direct a finding that the ordinance provisions are unconstitutional. The court further concludes that Section 19-152(C) and Section 19-153 (B) are dependent upon

the nuisance declarations in Sections 19-152(A) and (B) and Section 19-153(A) and, therefore, are also unconstitutional. The sections are dependent because even though they refer to materials rather than places, they only refer to materials which are sold or exhibited at places defined as public nuisances under the sections which the court has declared unconstitutional.

An appropriate order will be entered.

DATED: 1-5-85

Edward H. Johnstone, Judge
United States District Court

APPENDIX "C"

City of Paducah, Kentucky Public Nuisance Abatement Ordinance No. 83-6-2388, passed by the Board of Commissioners of Paducah, Kentucky on June 14, 1983.

(Reference: Petition for Writ of Certiorari at page 5, line 19; page 9, line 17; page 11, lines 2, 5, 14).

....C-1 thru C-29

ORDINANCE NO. 83-6-2388

AN ORDINANCE OF THE CITY OF PADUCAH DECLARING THE COMMERCIAL EXPLOITATION OF OBSCENE MOTION PICTURE FILMS AND OBSCENITY PUBLICATIONS TO BE CONTRARY TO PUBLIC HEALTH, SAFETY, AND GENERAL WELFARE, AND A PUBLIC NUISANCE; DECLARING ANY PLACE DISPLAYING OR EXHIBITING SUCH OBSCENE MOTION PICTURE FILMS OR PUBLICATIONS TO BE A PUBLIC NUISANCE PER SE; MAKING ALL OBSCENE MATTER AND PUBLICATIONS POSSESSED IN SUCH PLACES A PUBLIC NUISANCE PER SE; PROVIDING FOR NOTICE AND LEGAL PROCEEDINGS TO ABATE THE SAME; AND PROVIDING A PROCEDURE FOR ASSESSMENT AND COLLECTION OF COSTS OF ABATEMENT.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF PADUCAH, KENTUCKY:

Section 1. That the Board of Commissioners create Article VII of

Chapter 19 of the Code of Ordinances of the City of Paducah by adopting Sections 19-150, 19-151, 19-152, 19-153, 19-154, 19-155, 19-156, and 19-157 to read as follows:

"SECTION 19-150. PURPOSE; POLICY; AUTHORITY; APPLICATION.

The Board of Commissioners find that the crass commercial exploitation of explicit sexual conduct through the public exhibition of obscene films and the sale of obscene publications, constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and the development of human personality; that such exploitation is indecent and offensive to the senses and to public morals and interferes with the interest of the public in the quality of life and total community environment, the tone of

commerce in the City, property values, and the public safety; and that the continuation of such activities is detrimental to the best health, safety, convenience, good morals, and general welfare of the City of Paducah and of the residents, citizens, inhabitants, and business thereof and is unlawful and may not be made the subject of a lawful license. Pursuant to Section 82.082 of the Kentucky Revised Statutes, the Board of Commissioners hereby declares such activities to be public nuisances, and establishes procedures for the abatement thereof and for the assessment and collection of costs of abatement which may be incurred by the City incident to such abatement. This ordinance shall apply to existing establishments which are presently engaged in the activities herein declared to be public nuisances.

"SECTION 19-151. DEFINITIONS.

(A) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the obscene matter.

(B) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults

unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion

that the matter is utterly without redeeming social importance.

Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

(C) "Matter" shall mean a motion picture film or a publication, or both;

(D) "Motion picture film" shall include any:

(1) film or plate negative;

(2) film or plate positive;

(3) film designed to be projected on a screen for exhibition;

(4) films, glass slides or transparencies, either in negative or positive form designed for exhibition by projection on a screen;

(5) Video tape or any other medium used to electronically reproduce images on a screen.

(E) "Person" means any individual, partnership, firm, association, corporation, or other legal entity;

(F) "Place" includes, but is not limited to, any building, structure or place, or any separate part or portion thereof, whether permanent or not, or the ground itself. "Place" also includes any money, slug or coin-operated vending machine, or mechanical or electronically controlled vending machine, which is located upon or is accessible from a public sidewalk or thoroughfare;

(G) "Publication" shall include any book, magazine, newspaper, article, pamphlet, writing, printing, illustration, picture, sound recording, or a motion picture film when such film

is offered for sale or exhibited in a coin-operated machine.

(H) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, obscene matter.

SECTION 19-152. OBSCENE FILMS AND THEATERS EXHIBITING THE SAME DECLARED A PUBLIC NUISANCE PER SE; ADMISSION PRICE RECEIVED AFTER SERVICE OF RESOLUTION TO BE REGARDED AS A PUBLIC NUISANCE PER ACCIDENS.

The following are declared to be public nuisances per se:

(A) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course

of business, or possessed for the purpose of such exhibition;

(B) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition; and

(C) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.

From and after service on the theater, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all monies paid thereafter as admission price to such exhibitions shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared

public nuisance as to which forfeiture will be requested in the judicial proceedings required herein.

"SECTION 19-153. PLACE OF BUSINESS IN WHICH OBSCENE PUBLICATIONS CONSTITUTE A PRINCIPAL PART OF THE STOCK IN TRADE AND OBSCENE PUBLICATIONS POSSESSED THEREIN DECLARED A PUBLIC NUISANCE PER SE; VALUABLE CONSIDERATION RECEIVED FOR SALE AFTER SERVICE OF RESOLUTION TO BE REGARDED AS A PUBLIC NUISANCE PER ACCIDENS.

The following are declared to be public nuisances per se:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business

which are capable of demarcation, such place or places constitute the public nuisance which requires abatement; and

(B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

From and after service on the place, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all valuable consideration received for the sale of such obscene publications shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance, as to which forfeiture will be requested in the judicial proceedings required herein.

"SECTION 19-154. KNOWLEDGE OF NUISANCE PRESUMED FROM SERVICE OF COPY OF RESOLUTION; RESPONSIBILITY OF PARTIES THEREFOR; ABATEMENT OF SUCH NUISANCES.

(A) Upon receiving notice through service of a certified copy of this ordinance and of a certified copy of the resolution provided for herein, any and every person who shall own, legally or equitably, lease, maintain, manage, conduct, or operate a place in the City of Paducah which is declared to be a public nuisance as set forth and stated in Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah, is deemed to be a person who has knowledge of such nuisance for the purpose of this ordinance and is, thereafter, responsible for its maintenance, and shall be liable therefor.

(B) The places and subject matter declared to be public nuisances under Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah shall be abated, as provided for herein.

"SECTION 19-155. ACTION TO BE TAKEN BY BOARD OF COMMISSIONERS.

Upon a specific finding that a public nuisance, as defined in Section 19-152 or Section 19-153 of the Code of Ordinances of the City of Paducah, exists in the City of Paducah, the Board of Commissioners, in applying the provisions of this ordinance to such nuisance, shall provide for the following by resolution:

(A) Declare the fact that such nuisance exists;

(B) Set forth the description or legal description and street address of the real property which constitutes the nuisance.

(C) Set forth a statement of facts upon which the Board of Commissioners' declaration of nuisance is based;

(D) Order the revocation of all licenses and permits which have been issued as a part of the operation of such business, subject to confirmation by the court in the judicial proceedings required herein. Criminal proceedings for transacting business without a license at such address shall not be filed until the order of license revocation by the Board of Commissioners has been confirmed by judicial order;

(E) Order the Corporation Counsel to give written notice to all persons named in Section 19-154(a) of the Code of Ordinance of the City of Paducah, public nuisances immediately, by terminating the exhibitions of such obscene film or films and sale or offering for sale of such publications,

or causing the same to be terminated;

(F) Order the Corporation Counsel to proceed as directed in Section 19-156 of the Code of Ordinances of the City of Paducah and do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as is permissible under the law;

(G) Inform and give notice to persons named in Section 19-154(A) of the Code of Ordinances of the City of Paducah that:

(1) The Board of Commissioners has determined that a public nuisance presently exists at such place and address, and has revoked the licenses and permits at that place, subject to court confirmation, and that, under Section 19-154 of the Code of Ordinances of the

City of Paducah they are deemed to have knowledge thereof and are responsible therefor;

(2) The Board of Commissioners has ordered the Corporation Counsel, as provided for under Section 19-156 of the Code of Ordinances of the City of Paducah, to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially, and to seek recovery in said action of the costs of abatement, including investigative costs, court costs, attorney fees, and other expenses and that under Section 19-157 of the Code of Ordinances of the City of Paducah, the costs of

abatement are made a special assessment against the parcel of land upon which the nuisance is maintained, but only against the interest, if any therein, of the person responsible for maintaining such nuisance and, upon their determination by the Board of Commissioners, will, by separate resolution, be made a lien against the real property interest of the person responsible for maintaining such nuisance;

(3) All obscene motion picture film or films or obscene publications being used in conducting and maintaining such public nuisances are considered to be contraband and the subject of forfeiture;

(4) The obscene motion picture film or films or obscene publications which are being used in conducting and maintaining such public nuisance will be needed at the hearing in the court having jurisdiction of the legal proceedings brought by the Corporation Counsel.

(5) From and after service on the place or its manager or acting manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of such resolution, any and all monies paid as admission price to the exhibition or exhibitions of such obscene motion picture films, and valuable consideration

received for the sale of such obscene publications, shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining such nuisance, and as gain derived from a wrongful act, and that forfeiture of the same will be requested in the judicial proceedings required herein;

(H) Order that a certified copy of said resolution and a certified copy of this ordinance be delivered forthwith in any manner normally used to effectuate personal service of process as to all persons of record having any legal or equitable interest in the real property and to the regular or acting manager or persons in charge of the place therein declared a public nuisance.

"SECTION 19-156. ACTION TO BE TAKEN BY DISTRICT ATTORNEY.

Upon a specific finding by resolution of the Board of Commissioners of the fact that a public nuisance exists at a particular location, the Corporation Counsel shall:

(A) Forthwith, but not later than five (5) working days after passage of said resolution, commence legal proceedings by the filing of a civil action seeking the following relief:

(1) an order that the subject matter identified by the Board of Commissioners in said resolution is obscene as defined herein;

(2) an order that each place named by the Board of Commissioners is a public nuisance and that the action taken by the Board of Commissioners to revoke the

licenses issued to that place of business was lawful;

(3) an injunction enjoining and restraining all persons maintaining said nuisance from possessing or publicly exhibiting said obscene motion picture films, or from selling or possessing for sale said obscene publications at any time in the future in the City of Paducah, and such other injunctive relief as the court may order;

(4) an order that all positive prints of such obscene films and all such obscene publications or copies of reproductions thereof be forfeited as contraband;

(5) an accounting of all monies paid as admission price to the

exhibition or exhibitions of such obscene motion picture films and valuable consideration received for the sale of such obscene publications from and after the time the person or persons maintaining said nuisance received a copy of the resolution of the Board of Commissioners' finding that a public nuisance and a judgment that such monies are gain derived from a wrongful act and a public nuisance;

(6) an order that all admission price monies or valuable consideration received and enumerated in the court ordered accounting be forfeited as required by law;

(7) judgment of the City of Paducah for all costs expended in abating the public nuisance, including investigative costs, court costs, reasonable attorney fees, and such other expenses as are provided for herein; and

(8) all other relief as the court may deem proper.

(B) File a notice of the pendency of the action in the office of the McCracken County Clerk, giving the names of the parties, the object of the action, and a description of the property thereby affected.

"SECTION 19-157. COST OF ABATEMENT; ASSESSMENT; ASSESSMENT REPORT; HEARING ON ASSESSMENT REPORT; ASSESSMENT RESOLUTION; COLLECTION.

(A) The cost of abatement is hereby declared a special assessment against the parcel of land upon which the public nuisance is maintained, but only against the interest, if any therein, of the person or persons determined in the action to be responsible for maintaining such nuisance. As used herein, the term "cost of abatement" shall include, but is not limited to, the following: (1) investigative costs; (2) court costs; (3) reasonable attorney fees; and (4) printing costs for any trial and appeal.

(B) Upon the filing of a County Court judgment adjudicating the existence of a public nuisance in any proceedings instituted pursuant to these sections, the Corporation Counsel shall file with the City Clerk a written report containing his account of the expenses of abatement, the person or

persons determined in the action to be responsible for maintaining such nuisances, a description of the premises on which such abatement occurred, and the assessment against each lot or parcel of land proposed to be levied to pay the cost thereof. The clerk shall then set the report for hearing by the Board of Commissioners and shall, not less than ten (10) days prior to the date set for such hearing, serve notice of assessment upon the owners, which notice shall specify the day, hour and place when the Board of Commissioners shall hear and pass upon the assessment report together with any objections or protests thereto.

(C) Upon the date and hour fixed for the hearing, the Board of Commissioners shall hear and pass upon the assessment report together with any objections or protests which may be

raised by any of the owners of any property liable to be assessed for the costs of abatement of any other interested persons. The Board of Commissioners may make such revision, correction or modifications in the report as it may deem just, after which the report as submitted, or as revised, corrected or modified, shall be confirmed. The Board of Commissioners may adjourn the hearings from time to time. The decisions of the Board of Commissioners on all protests and objections which may be made shall be final and conclusive.

(D) Upon confirmation of the assessment report, the Board of Commissioners shall adopt a resolution specifying the amount assessed against each respective parcel as shown on the last available assessment roll in accordance with the assessment report.

Unless otherwise provided in such resolution, any such assessment shall become due thirty (30) days after adoption of such resolution and shall thereafter bear interest at the rate of fifteen per cent (15%) per year. The Board of Commissioners may provide in the resolution for payment to become due at any later date, in total sum or in installments.

(E) All assessments may be paid by tender of the amount due to the City Treasurer. The City Treasurer, prior to August 10 of each year, shall determine if any assessment, or portion thereof, is due and unpaid, and if he so determines, such assessment shall be collected at the same time and in the same manner as ordinary City taxes are collected and shall be subject to the same penalties and the same procedure and sale in case of delinquency as

provided for ordinary City taxes. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to the levy, collection and enforcement of municipal taxes shall be applicable to such special assessment.

SECTION 2. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The Board of Commissioners of the City of Paducah hereby declares that it would have adopted this ordinance and each section, subsection, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections,

sentences, clauses, phrases or portions be declared invalid or unconstitutional.

SECTION 3. This ordinance shall be read on two separate days and will be effective upon publication of a certified summary thereof.

_____
Mayor

Introduced by the Board of Commissioners May 31, 1983

Passed by the Board of Commissioners June 14, 1983

Recorded by Louise McKinney, City Clerk, June 14, 1983

Published by The Paducah Sun June 20, 1983.

APPENDIX "D"

Resolution of the Board of Commissioners of the City of Paducah, Kentucky passed August 3, 1983, finding the business known as Tammy's Book Store To Be A Public Nuisance Pursuant to Section 19-153 of the Code of Ordinances of the City of Paducah As A Place of Business In Which Obscene Publications Constitute All of the Stock in Trade or a Principle Part of the Stock in Trade and Revoking All Licenses and Permits Except That No Criminal Proceedings May Be Filed for Transactions Business Without A License Until The Fact of Public Nuisance Has Been Confirmed by a Decree of the McCracken County Court in Judicial Proceedings.

(Reference: Petition for Writ of Certiorari at page 13 line 3).

....D-1 thru D-16

RESOLUTION

WHEREAS, on the 14th day of June, 1983, the Board of Commissioners of the City of Paducah adopted Ordinance No. 83-6-2388 declaring the commercial exploitation of obscene motion picture films and obscene publications to be contrary to the public health, safety, and general welfare, and a public nuisance, and

WHEREAS, on June 22, 1983, Officer Kermit Perdew visited a business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, and

WHEREAS, at that time said officer observed motion pictures, magazines, and other material which taken as a whole the appeal to the average person is to the prurient interest and the matter, taken as a whole, lacks any redeeming social importance, and

WHEREAS, on July 2, 1983 Officer Kermit Perdew returned to the place of business known as Tammy's Book Store and purchased the following material:

"EROTIC INTERLUDE", (Where one man's woman is another man's pleasure), a video tape (Beta); and "BACK DOOR" NUMBER TWO ("Come with us on a Journey and see just how much fun, anal sex can be!"), and

WHEREAS, on July 10, 1983, Officer Kermit Perdew again went to the premises of Tammy's Book Store and purchased the following material: "THE FILTHY RICH" (the secret pleasures of those who have it made), a video tape (Beta); and "MR/MRS" ("he had this thing for women's clothes.), and

WHEREAS, the Board of Commissioners conducted a public hearing on August 3, 1983, at the hour of 1:00 p.m. at which time the Board of Commissioners reviewed all of the above mentioned materials.

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF PADUCAH, AS FOLLOWS:

SECTION 1. The Board of Commissioners hereby finds the following facts: On July 2, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following materials:

Caballero Control Corporation Presents "EROTIC INTERLUDE", (Where one man's women is another man's pleasure). A video tape (Beta) with approximate running time of 84 minutes.

This material contains numerous explicit scenes of sex acts between males and females, females and females, including natural and contorted sexual intercourse, felatio and cunnilingus,

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is

obscene under the ordinance of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 2. The Board of Commissioners hereby finds the following facts: On July 2, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following materials: "BACK DOOR" NUMBER TWO ("Come with us on a Journey and see just how much fun, anal sex can be!") from the publishers of Swedish Erotica Magazine and Books.

A 36 slick-page magazine containing color photographs in an explicit manner, sexual relations between men and women, including sexual intercourse (both natural and contorted) and acts of cunnilingus and felatio, and anal intercourse.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 3. The Board of Commissioners hereby finds the following facts: On July 10, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following material:

Swedish Erotica presents (distributed by Caballero Control Corporation) "THE FILTHY RICH" (the secret pleasures of those who have it made). A video tape (Beta) with approximate running time of 80 minutes.

The material contains numerous explicit scenes of sex acts between males and females, including natural and contorted sexual intercourse, felatio and cunnilingus, and masturbation.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the

Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 4. The Board of Commissioners hereby finds the following facts: On July 10, 1983, the place of business located at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store, sold the following material:

"MR/MRS" (he had this thing for women's clothes.) From the publishers of Swedish Erotica magazines and books.

A 36 click-page magazine containing color photographs depicting in an

explicit manner sexual relations between men and women, including sexual intercourse (both natural and contorted) and acts of cunnilingus and felation.

The Board of Commissioners after reviewing said material on August 3, 1983, finds that said material is obscene under the ordinances of the City of Paducah and the statutes of the Commonwealth of Kentucky, in that the matter taken as a whole, the predominant appeal to the average person, applying contemporary community standards, is to the prurient interest. The material, taken as a whole, goes substantially beyond customary limits of candor of description and representation of such matters and, taken as a whole, the material is utterly without redeeming social importance.

SECTION 5. The Board of Commissioners of the City of Paducah

hereby finds that the business known as Tammy's Book Store is owned and operated by Investment Entertainment, Inc. with its principal place of business at 243 Brown Street, Paducah, Kentucky.

SECTION 6. The Board of Commissioners hereby finds that the business known as Tammy's Book Store is a public nuisance and that all material possessed at 243 Brown Street, Paducah, Kentucky is a public nuisance pursuant to Section 19-152 and 19-153 of the Code of Ordinances of the City of Paducah.

SECTION 7. Tammy's Book Store is located at 243 Brown Street, Paducah, Kentucky, more particularly described as follows:

> Beginning on the south side of Brown Street at a tack of distance of 94.32 feet in a westerly direction from a southwest intersection of Brown Street and Beltline Highway (now Irvin Cobb Drive); thence at a right angle in a southerly direction a distance of 125 feet to an iron pipe; thence at

a right angle in a westerly direction a distance of 50 feet to an iron rod; thence at a right angle in a northerly direction a distance of 125 feet to an iron rod on the south line of Brown Street; thence with the south line of Brown Street at a right angle a distance of 50 feet in an easterly direction to the point of beginning.

Beginning the same property in all respects that was conveyed to Investment Entertainment, Inc. by deed dated the 21st day of March, 1983, and recorded in Deed Book 653, Page 239, in the McCracken County Court Clerk's Office.

SECTION 8. The Board of Commissioners hereby orders revocation of all licenses and permits that have been issued as a part of the operation of Tammy's Book Store and/or Investment Entertainment, Inc. subject to confirmation by the McCracken Circuit Court in judicial proceedings hereinafter required.

SECTION 9. The Board of Commissioners hereby orders the Corporation Counsel to give written

notice to all persons associated with 243 Brown Street, Paducah, Kentucky, including but not limited to Investment Entertainment, Inc., all employees and managers of Tammy's Book Store and/or Investment Entertainment, Inc. to abate the public nuisances immediately by terminating the exploitation of obscene film or films for sale or offering for sale of such publication or causing the same to be terminated.

SECTION 10. The Board of Commissioners further orders the Corporation Counsel to proceed as directed under Section 19-156 of the Code of Ordinances of the City of Paducah and to do all things necessary to abate such public nuisance through judicial proceedings and to conclude such proceedings as expeditiously as possible under the law. It is ordered that a certified copy of this Resolution

shall be served on the statutory agent of Investment Entertainment, Inc., all officers and employees and agents thereof, which can be found within the City of Paducah, that said business has been declared a public nuisance and has revoked the licenses and permits at that place, subject to court confirmation, and that under Section 19-154 of the Code of Ordinances of the City of Paducah they are deemed to have knowledge thereof and are responsible therefor. They shall further be notified that the Board of Commissioners has ordered the Corporation Counsel as provided under Section 19-156 of the Code of Ordinances of the City of Paducah to commence legal proceedings naming such persons as defendants in a civil action to abate the same judicially and to seek recovery in said action of the cost of said abatement,

including investigation costs, court costs, attorneys fees, and other expenses and under Section 19-157 of the Code of Ordinances of the City of Paducah. The costs of abatement are made a special assessment against the parcel of land upon which the business is maintained.

The Board of Commissioners, will, by separate resolution, place a lien against the real property interest or the person responsible for maintaining such nuisance. Said persons are to be further informed that all obscene motion picture film or films or obscene publications being used and maintaining such public nuisance are considered to be contraband and subject to forfeiture. Said persons are to be further notified that the obscene motion picture film or films or obscene publications which are being used in conducting and maintaining

such public nuisance will be needed at the hearing in court having jurisdiction of legal proceedings brought by the Corporation Counsel. Said persons shall further be notified that from and after the serving of notice on the place or its managing or acting manager or person then in charge of such place, or a certified copy of Ordinance No. 83-6-2388 of the City of Paducah and a certified copy of this Resolution, any and all monies paid as admission price to exhibitions of such obscene motion picture films, and valuable consideration received for the sale of such obscene publications, shall be regarded as a public nuisance per accident as personal property used in conducting and maintaining such nuisance, and as being gain derived from a wrongful act, and the forfeiture of same will be requested in the judicial proceedings required herein.

SECTION 11. The Board of Commissioners hereby orders that a certified copy of this Resolution and that a certified copy of Ordinance No. 83-6-2388 be delivered forthwith by the Police Department of the City of Paducah, or by certified mail properly deposited with the United States Post Office to all person of record having any legal or equitable interest in the real property, and to the regular or acting manager or person in charge of the place therein, declared a public nuisance.

SECTION 12. This Resolution is adopted according to law, and shall be effective immediately upon its adoption.

_____
Mayor

Passed by the Board of Commissioners August 3, 1983

Recorded by Louise McKinney, City Clerk, August 3, 1983.

I hereby certify that the above is a true and correct copy of a Resolution adopted by the City of Paducah on August 3, 1983.

_____
City Clerk

APPENDIX "E"

Complaint in the United States District Court For the Western District Of Kentucky, at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.," Civil Action File No. C83-0209P(J), filed August 3, 1983.

(Reference: Petition for Writ of Certiorari at page 3 line 10; page 15, line 16).

....E-1 thru E-8

Amended Complaint in the United States District Court For The Western District Of Kentucky at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.", Civil Action File No. 83-0208-P(J), August 10, 1983.

....E-9 thru E-15

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
PLAINTIFF	)	
VS.	)	COMPLAINT
CITY OF PADUCAH: JOHN K. PENROD, AS MAYOR, AND JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD AND JAMES W. FLYNN, AS COMMISSIONERS OF SAID CITY: JAMES W. UTTER, AS CORPORATION COUNSEL, AND THURMAN BAKER, AS TREASURER THEREOF	)	
DEFENDANTS	)	

Plaintiff, Investment Entertainment, Inc., for its complaint herein says that:

1. The jurisdiction of this Court is invoked under the Constitution of the United States and the First and Fourteenth Amendments thereto; under Title 42, United States Code, Section

1983, providing that every person who under color of any statute, ordinance, regulation, custom or usage of any State subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by said Constitution shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress; under Title 28, United States Code, Section 1343 (3), conferring upon the United States District Court's original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege of immunity secured by the said Constitution; and under Title 28, United States Code,

Section 2201, providing for the rendition of declaratory judgments by the said courts.

2. Plaintiff is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Tennessee, and is and was at all times hereinafter mentioned duly authorized under the laws of the State of Kentucky to transact business in said latter State. At all times hereinafter mentioned, plaintiff owned and operated, and now owns and operates, at Paducah, Kentucky, a place of business for the exhibition and/or sale of motion picture films, video tapes, and video cassettes, books, magazines and other materials of like nature, known as "Tammy's Book Store."

3. The defendant City of Paducah is a municipal corporation of the State of Kentucky of the second class,

organized and operating under the city manager form of government. The defendant, John K. Penrod, is the Mayor of said City of Paducah, and the defendants, Joe Viterisi, Robert A. Coleman, Harold (Shorty) Ford and James W. Flynn are its Commissioners, and together said Mayor and Commissioners constitute the Board of Commissioners, which is the legislative body of said city. The defendant, James W. Utter is Corporation Counsel of said city, and the defendant, Thurman Baker is its Treasurer.

4. On June 14, 1983, the said Board of Commissioners enacted an ordinance designated as Ordinance No. 83-6-2388, a copy of which is annexed to this complaint part thereof as Exhibit "A" thereto; and on July 13, 1983, the defendant, Utter, as Corporation Counsel aforesaid notified plaintiff in writing of the intention of the defendant, City

of Paducah, to institute proceedings against plaintiff under said ordinance. A copy of said notice is annexed to this complaint as part thereof as Exhibit "B" thereto. Thereafter, the date of the hearing before the Board of Commissioners mentioned in said notice was amended to August 3, 1983, and said hearing is to be held on that date.

5. The aforesaid ordinance is unconstitutional, invalid, unenforceable, null and void, both on its face and as applied to plaintiff, as violative of the Constitution of the United States and the First and Fourteenth amendments thereto, and of the rights of the plaintiff under said Constitution and said Amendments, in that the provisions of said ordinance and the enforcement procedures set forth therein constitute an unconstitutional prior restraining upon the exhibition

and distribution of literary and pictorial matter protected therefrom by the First and Fourteenth Amendments to the Constitution of the United States, and a deprivation of plaintiff's rights, liberty and property without due process of law.

6. Unless enjoined and restrained therefrom by this Court, defendants will continue to proceed against plaintiff under the provisions and procedures of said unconstitutional ordinance, will impose unconstitutional prior restraint upon its exhibition and distribution of said protected materials, and will deprive plaintiff of its constitutionally protected rights, liberty and property without due process of law, all in violation of plaintiff's constitutional rights. As a result, plaintiff will suffer immediate and irreparable injury, loss and damage therefrom, to redress which plaintiff

has no adequate remedy at law and therefore seeks equitable relief by way of injunction.

7. An actual controversy within the jurisdiction of this Court exists between plaintiff and defendants, in that plaintiff contends that said ordinance and all provisions thereof and procedures prescribed thereby are invalid, unconstitutional, unenforceable, null and void, both on their face and as applied to plaintiff, whereas defendants contend the contrary.

WHEREFORE, plaintiff demands (1) a declaratory judgment to the effect that said ordinance is unconstitutional and unenforceable; (2) that defendants be permanently and perpetually enjoined and restrained from proceeding against plaintiff under said ordinance or any

provision thereof; and (3) the recovery of its costs.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, Kentucky 42001
Attorney for Plaintiff
(502) 442-0121

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
PLAINTIFF	)	
VS.	)	AMENDED COMPLAINT
CITY OF PADUCAH, ET AL.	)	
DEFENDANTS	)	

Plaintiff, Investment Entertainment, Inc., amends its complaint before service of any responsive pleading by any of the defendants, and for amendment adds thereto the following averments:

1. On August 3, 1983, the defendants Penrod, as Mayor, and Viterisi, Coleman, Ford, Flynn, as Commissioners, constituting the Board of Commissioners of the defendant City of Paducah, adopted a resolution of the said Board, a copy of which is annexed

hereto and made a part of this amended complaint as Exhibit "C" thereto.

2. On August 5, 1983, the defendant Utter, as Corporation Counsel of said defendant city, issued and caused to be served upon plaintiff, together with a certified copy of said resolution and a certified copy of the ordinance mentioned in the complaint, a written notice, a copy of which is annexed hereto and made a part of this amended complaint as Exhibit "D" thereto.

3. Unless enjoined and restrained therefrom by this Court, the defendants will proceed to carry said resolution into effect, and to enforce its provisions against plaintiff in violation and deprivation of plaintiff's rights under the Constitution of the United States and the First and Fourteenth Amendments thereto.

4. The said resolution is unconstitutional, invald, enforceable, null and void, both on its face and as applied to plaintiff, as violative of the Constitution of the United States and the First and Fourteenth Amendments thereto, and of the rights of the plaintiff under said Constitution and said Amendments, in the following respects:

(a) The provisions thereof and the procedures set forth therein constitute unconstitutional prior restraint upon the exhibition and distribution of literary and pictorial matter protected therefrom by said constitution and said Amendments.

(b) The finding of the Board of Commissioners that the video tapes and magazines referred to in said resolution are obscene is not supported by evidence.

(c) The finding of the Board of Commissioners, based upon viewing two video tapes and perusing two magazines, that plaintiff's business is a public nuisance and that all materials obssessed by it constitute a public nuisance, is not supported by evidence, and is irrational.

(d) The attempted revocation of plaintiff's business licenses, the attempted imposition of costs, the attempted imposition of a lien against plaintiff's property, and the attempts forfeiture of plaintiff's business receipts, all as provided by the provisions of said resolution, constitute a deprivation of plaintiff's property without due process of law.

5. The attempted enforcement of the provisions of said resolution against plaintiff by defendants threatens plaintiff with immediate and

irreparable injury, loss and damage therefrom, to redress which plaintiff has no adequate remedy at law and therefore seeks equitable relief by way of injunction.

6. An actual controversy within the jurisidction of this Court exists between plaintiff and defendants, in that plaintiff contends that said resolution and all provisions thereof and procedures prescribed thereby are unconstitutional, invalid, unenforceable, null and void, both on their face and as applied to plaintiff, whereas defendants contend the contrary.

WHEREFORE, plaintiff demands (1) a declaratory judgment to the effect that said resolution is unconstitutional and unenforceable; (2) that defendants be permanently and perpetually enjoined and restrained from proceeding against plaintiff under said resolution or any

provision thereof; (3) the relief demanded by its original complaint; and (4) the recovery of its costs.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, Kentucky 42001
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 1983, I mailed a copy of the foregoing amended complaint and annexed exhibits to each of the following named defendants at their respective last known addresses: City of Paducah, P.O. Box 2267, Paducah, Kentucky 42001; John K. Penrod, 814 Bellevue Drive, Paducah, Kentucky 42001; Joe Viterisi, 950 Park Avenue, Paducah, Kentucky 42001; Robert A. Coleman, 639 North 23rd Street, Paducah, Kentucky 42110; Harold Ford, 195 Idlewild Drive, Paducah, Kentucky

42001; James W. Flynn, 1118 Jefferson Street, Paducah, Kentucky 42001; James W. Utter, P.O. Box 2267, Paducah, Kentucky 42001; and Thurman Baker, P.O.Box 2267, Paducah, Kentucky 42001.

Attorney for Plaintiff

APPENDIX "F"

Complaint and Petition for Temporary and Permanent Injunction filed by the City of Paducah on August 10, 1986 in the McCracken Circuit Court.

(Reference: Petition for Writ of Certiorari at page 16, line 9).

....F-1 thru F-12

McCRACKEN CIRCUIT COURT
CIVIL ACTION NO. 83-CI-
DIVISION NO.

CITY OF PADUCAH	)	
	)	
PLAINTIFF,	)	COMPLAINT
	)	AND PET-
VS.	)	ITION FOR
	)	TEMPORARY
INVESTMENT ENTERTAINMENT,	)	AND PER-
INC. Serve: James L.	)	MANENT
Lindblad, Citizens Bank	)	INJUNCT-
Building, Paducah,	)	ION
KY 42001, Statutory Agent	)	
	)	
DEFENDANT.	)	

Comes the City of Paducah and for its complaint and petition for temporary and permanent injunction against the defendant states as follows:

1. The plaintiff, City of Paducah, is a city of the second class, possessing all powers conferred upon cities of the second class by the statutes of the Commonwealth of Kentucky and under the general powers of city of the second class under the statutes of the Commonwealth of Kentucky, the City

of Paducah has the power to declare the existence of public nuisances within the City of Paducah.

2. The defendant, Investment Entertainment, Inc., is a corporation which is incorporated under the laws of the Commonwealth of Kentucky with its principle place of business being Citizens Bank Building, Paducah, Kentucky.

3. Investment Entertainment, Inc., is the owner of real estate known as 243 Brown Street, Paducah, Kentucky, more particularly described as follows:

> Beginning on the south side of Brown Street at a tack a distance of 94.32 feet in a westerly direction from a southwest intersection of Brown Street and Beltline Highway (now Irvin Cobb Drive); thence at a right angle in a southerly direction a distance of 125 feet to an iron pipe; thence at a right angle in a westerly direction a distance of 50 feet to an iron rod; thence at a right angle in a northerly direction a distance of 125 feet to an iron rod on the south line of Brown Street;

thence with the south line of Brown Street at a right angle a distance of 50 feet in an easterly direction to the point of beginning.

Being the same property in all respects that was conveyed to Investment Entertainment, Inc. by deed dated the 21st day of March, 1983, and recorded in Deed Book 653, Page 239, in the McCracken County Court Clerk's Office.

4. The defendant, Investment Entertainment, Inc., operates a business at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store.

5. On April 8, 1983, Investment Entertainment, Inc., David Capps, president, applied for and received a 1983 business license for retail sales within the City of Paducah.

6. On April 8, 1983, Investment Entertainment, Inc., David Capps, president, applied for and received a business license for an amusement business at 243 Brown Street, Paducah, Kentucky, known as Tammy's Book Store.

7. On June 14, 1983, the Board of Commissioners adopted Ordinance No. 83-6-2388 which declares the commercial exploitation of obscene motion picture films (as defined in the ordinance) and obscene publications to be contrary to the public health, safety and general welfare and a public nuisance, and declaring a place displaying or exhibiting such obscene motion picture films or publications to be a public nuisance per se; making all obscene matter and publications in such place a public nuisance per se; providing for notice and legal proceedings to abate the same and providing a procedure for assessment and the collection of costs of abatement. A copy of said ordinance is attached hereto and made a part hereof as if set out in full. (See exhibit A.)

8. On the 22nd day of June, 1983, a police officer of the City of Paducah visited the business known as Tammy's Book Store, which is operated by Investment Entertainment, Inc. located at 243 Brown Street, Paducah, Kentucky, and observed the display for sale of materials which appeared to the officer to be in violation of the Ordinance No. 83-6-2388 of the City of Paducah, declaring it a public nuisance to engage in the commercial exploitation of obscene motion picture films and obscene publications as defined in that ordinance.

9. On July 2, 1983, the same officer of the City of Paducah returned to the place of business known as Tammy's Book Store located at 243 Brown Street, Paducah, Kentucky, and purchased a video tape entitled "EROTIC INTERLUDE" and a magazine entitled "BACK DOOR NUMBER TWO".

10. On July 10, 1983, the same officer returned to Tammy's Book store at the above address, and again purchased a video tape entitled, "THE FILTHY RICH" and a magazine entitled, "MR/MRS".

11. On August 3, 1983, the Board of Commissioners of the City of Paducah conducted a hearing, pursuant to the ordinance, 83-6-2388, and after reviewing the magazines in their entirety and the video tapes, "EROTIC INTERLUDE" and "THE FILTHY RICH", in their entirety, adopted a Resolution which is attached hereto and made a part hereof as if set out in full as exhibit B hereto.

12. Said Resolution pursuant to the above referenced ordinance, found that the business known as Tammy's Book Store and operated by Investment Entertainment, Inc., to be a public

nuisance and the commercial exploitation of obscene material and ordered the revocation of all licenses and permits issued by the City of Paducah to Tammy's Book Store and/or Investment Entertainment, Inc., subject to confirmation by McCracken Circuit Court in a judicial proceeding to be filed therein.

13. Pursuant to Ordinance 83-6-2388, particularly Section 19-154, on August 5, 1983, the corporation statutory agent, their attorney, their general manager or person in charge of the premises and all employees thereof were served with a copy of the Ordinance No. 83-6-2388, the Resolution adopted by the Board of Commissioners on August 3, 1983, and a letter from the Corporation Counsel of the City of Paducah advising them of findings of the Board of Commissioners and the effect of said

ordinance and resolution, a copy of which said letter is attached hereto as exhibit C.

14. Section 19-153 of Ordinance 83-6-2388, declares the following to be nuisances per se:

(A) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications constitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such place or places constitute the public nuisance which requires abatement; and

(B) Any and every obscene publication possessed at a place which is a public nuisance under this Section.

From and after service on the place, or its manager, or acting

manager, or person then in charge of such place, of a certified copy of this ordinance and a certified copy of the resolution provided for herein, all valuable consideration received for the sale of such obscene publications shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance, as to which forfeiture will be requested in the judicial proceedings required herein.

WHEREFORE, the City of Paducah demands that the Court find that the subject matter identified by the Board of Commissioners in said Resolution is obscene as defined within Ordinance 83-6-2388, that each place named by the Board of Commissioners is a public nuisance and that the action taken by the Board of Commissioners to revoke the licenses issued to that place of

business was unlawful; enter an injunction both temporary and permanent, restraining all persons maintaining said nuisance from possessing or publicly exhibited said obscene motion picture films, as defined in the ordinance, or from selling or possessing for sale said obscene publications at any time in the future in the City of Paducah, and such other injunctive relief as the court may order; and order that all positive prints of said obscene films and all said obscene publication or copies or reproductions thereof, be forfeited as contraband, order an accounting of all monies paid as admission price to the exhibition or exhibitions of said obscene motion picture films (as defined within said ordinance) and valuable consideration received for the sale of such obscene publication from and after 10:00 o'clock a.m. August 5, 1983, at

which time the person or persons maintained of said nuisance received a copy of the Resolution of the Board of Commissioners finding that a public nuisance existed and grant to the City of Paducah a judgment that such monies are again derived from wrongful acts and a public nuisance; order that all admission price monies or valuable consideration received and any money in the court order accounting, be forfeitured as required by law to the City of Paducah; grant to the City of Paducah, a judgment for all costs expended in abating the public nuisance including investigation costs, court

costs, reasonable attorneys fees, and such other expenses provided for herein and all relief to which the court may deem proper.

James W. Utter
Attorney at Law
P.O. Box 2267-
City Hall
Paducah, KY 42001

ATTORNEY FOR
DEFENDANT

APPENDIX "G"

Answer of the City of Paducah to Complaint in the United States District Court For The Western District Of Kentucky at Paducah, entitled "Investment Entertainment, Inc. v. City of Paducah, et al.," Civil Action File No. C83-0208P(J).

(Reference: Petition for Writ of Certiorari at page 4, line 3; page 16, line 20; page 45, line 1.

....G-1 thru G-5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CIVIL ACTION FILE NO. 83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
	)	
PLAINTIFF,	)	ANSWER
	)	
VS.	)	
	)	
CITY OF PADUCAH, ET AL	)	
	)	
DEFENDANT.	)	

Come the defendants and for their answer to the complaint state as follows:

FIRST DEFENSE

The complaint and amended complaint fail to state a claim upon which relief can be granted.

SECOND DEFENSE

As to the complaint, the defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 7, and so much of paragraph 6 which states that "unless enjoined and restrained therefrom by this court, the defendants will continue

to proceed against the plaintiff under the provisions and procedures of said ordinance". Defendants deny the allegations contained in paragraph 5, the remaining allegations in paragraph 6 including the unconstitutionality of the ordinance: the defendants deny each and every other allegation of the complaint not specifically admitted.

THIRD DEFENSE

As to the amended complaint, the defendants admit the allegations contained in paragraphs 1, 2, 6, and so much of paragraph 3 which states that the defendants will carry said resolution into effect and enforce its provisions against plaintiff: defendants deny the remaining allegations in paragraph 3, paragraph 4 in its entirety, and paragraph 6: defendants deny each and every other allegation of the amended complaint not

specifically admitted herein.

FOURTH DEFENSE

There is presently pending in McCracken Circuit Court, Civil Action No. 83-CI-590, styled City of Paducah vs. Investment Entertainment, Inc. and in which suit the state courts will make a determination of the law applicable on the subject matter of this suit pending in Federal District Court, and the Federal District Court should abstain from further proceeding in this action until a final determination is made on the merits and the action filed in the McCracken Circuit Court.

FIFTH DEFENSE

The Ordinance, No. 83-6-2388, attached as exhibit "A" to the complaint is constitutional in its entirety and is applied to this defendant in that no prior restraint exist under the ordinance, and a court review of the

material is required before any licenses would be revoked by the city of Paducah, and all hearings by the Board of Commissioners of the City of Paducah and court proceedings under said ordinance only apply to an existing business which deals in obscenity as defined by said ordinance, which definition substantially complies with the permissible regulations under the first amendment to the constitution of the United States.

WHEREFORE, the defendants demand that the complaint and amended complaint against them be dismissed, that they recover their costs herein expended and all other relief to which they may appear entitled.

James W. Utter
Corporation Counsel
P.O. Box 2267
Paducah, KY 42001
ATTORNEY FOR
DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, on this 15th day of August, 1983, to: Hon. Joseph S. Freeland, Freeland, Glanville & Megibow, 910 Citizens Bank Building, Paducah, KY 42001, attorney for Investment Entertainment, Inc.

James W. Utter

APPENDIX "H"

1. Motion for Summary Judgment of Investment Entertainment, Inc. in Civil Action No. C83-0208P(J) filed February 2, 1984.

(Reference: Petition for Writ of Certiorari at page 18, line 18).

....H-1 thru H-5

2. Motion for Summary Judgment of City of Paducah in Civil Action No. C83-0217P(J) consolidated with No. 83-0208P(J), filed March 9, 1984.

....H-6 thru H-8

3. Motion for Summary Judgment of Beltline News and Arcade Club, Inc., in Civil Action No. C83-0237-P(J), filed Feb. 1, 1984.

....H-9 thru H-14

4. Motion for Summary Judgment of City of Paducah in Civil Action No. C83-0237P(J), filed March 9, 1984.

....H-15 thru H-16

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0208-P(J)

INVESTMENT ENTERTAINMENT, INC.	)	
	)	
PLAINTIFF,	)	MOTION
	)	FOR
VS.	)	SUMMARY
	)	JUDG-
CITY OF PADUCAH, ET AL.	)	MENT
	)	
DEFENDANTS.	)	

Plaintiff, Investment Entertainment, Inc., moves the Court for the entry of a summary judgment for the relief demanded in its complaint and amended complaint, upon the ground that the pleadings (including the exhibits thereto) and the annexed affidavit (including the exhibit thereto) show that there is no genuine issue as to any

material fact, and that plaintiff is entitled to such judgment as a matter of law.

Joseph S. Freeland
FREELAND, GLANVILLE & MEGIBOW
910 Citizens' Bank Building
Paducah, KY 42001
Attorney for Plaintiff
(502) 442-0121

AFFIDAVIT

STATE OF KENTUCKY)
) Sct.
COUNTY OF McCRACKEN)

The affiant, Joseph S. Freeland, being duly sworn, deposes upon oath as follows:

1. Affiant is 68 years of age, is and has been continuously for the past 45 years a regularly licensed and practicing attorney at law at Paducah, Kentucky, is the attorney for the plaintiff, Investment Entertainment,

Inc., in this action, and has been plaintiff's counsel continuously since some time in May, 1983.

2. Affiant makes this affidavit on his own personal knowledge, and is competent to testify to the matters stated therein.

3. The pleadings in this action, together with all exhibits thereto, are made a part of this affidavit by reference, to the same extent as if copied in full therein.

4. Affiant personally attended and was present at, and during the entirety of, the hearing conducted by the Board of Commissioners of the defendant City of Paducah on August 3, 1983, at the time of the adoption by said Board of the resolution annexed as Exhibit "C" to plaintiff's amended complaint, and personally saw and heard all that transpired at said hearing.

5. Said hearing was stenographically reported, at the instance of the defendants, by Shirley B. France, a stenographic reporter and Notary Public, who thereafter transcribed here stenographic notes taken at said hearing upon the typewriter. A copy of said transcript of said hearing is annexed hereto and made a part hereof as Exhibit No. 1.

6. Affiant knows of his own personal knowledge that said transcript is a full, correct and complete report of all proceedings had by and before said Board at said hearing of August 3, 1983.

And further affiant sayeth not.

_____

Joseph S. Freeland

Subscribed and sworn to before me by Joseph S. Freeland this 2nd day of February, 1984. My commission as Notary Public will expire August 12, 1987.

_____
Notary Public, State
of Kentucky at Large

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 1984, I mailed a copy of the foregoing motion and affidavit to Hon. James W. Utter, defendants' attorney, at his last known address, P.O. Box 2267, Paducah, Kentucky 42001.

_____
Attorney for
Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CITY OF PADUCAH	)	
	)	
vs.	)	Civil Action
	)	No. 83-0217
INVESTMENT ENTERTAIN-	)	P(J)
MENT, INC. and SHOW-	)	
TIME ENTERTAINMENT,	)	
INC.	)	
	)	
CONSOLIDATED WITH:	)	MOTION FOR
	)	SUMMARY
INVESTMENT ENTERTAIN-	)	JUDGMENT
MENT, INC.	)	
	)	
vs.	)	Civil Action
	)	No. 83-0208
CITY OF PADUCAH, ET	)	P(J)
AL.	)	

Comes the City of Paducah and moves the Court for Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, in that the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact in that the City of Paducah is entitled to a judgment as a matter of law.

The City of Paducah herein files its Memorandum in Support of said Motion.

James W. Utter
P.O. Box 2267
Paducah, KY 42001

Attorney for
City of Paducah

NOTICE

This Motion is being submitted pursuant to the Order of the Court of February 14, 1984.

James W. Utter

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to the Hon. Joseph Freeland, Citizens Bank Building, Paducah, KY 42001, attorney for Investment Entertainment, Inc. and Showtime Entertainment, Inc., on this 8th day of March, 1984.

James W. Utter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Civil Action File No. C83-0237-P(J)

BELTLINE NEWS & ARCADE CLUB, INC.	)	
PLAINTIFF,	)	MOTION FOR SUMMARY JUDGMENT
VS.	)	
CITY OF PADUCAH, ET AL	)	
DEFENDANT.	)	

Plaintiff, Beltline News & Arcade Club, Inc., moves the Court for the entry of a summary judgment for the relief demanded in its complaint and amended complaint, upon the ground that the pleadings (including the exhibits thereto) and the annexed affidavit (including the exhibits thereto) show

that there is no genuine issue as to any material fact, and that plaintiff is entitled to such judgment as a matter of law.

Joseph S. Freeland
FREELAND, GLANVILLE
& MEGIBOW
910 Citizens' Bank
Building
Paducah, KY 42001
Attorney for
Plaintiff
(502) 442-0121

AFFIDAVIT

STATE OF KENTUCKY)
) Sct.
COUNTY OF McCRACKEN)

The affiant, Joseph S. Freeland, being duly sworn, deposes upon oath as follows:

1. Affiant is 68 years of age, is and has been continuously for the past 45 years a regularly licensed and practicing attorney at law at Paducah,

Kentucky, is the attorney for the plaintiff, Beltline News & Arcade Club, Inc., and has been plaintiff's counsel and registered process agent continuously since plaintiff was organized as a non-stock, non-profit corporation under the laws of the State of Kentucky in April, 1982.

2. Affiant makes this affidavit on his own personal knowledge, and is competent to testify to the matters stated therein.

3. A certified copy of plaintiff's articles of incorporation is annexed hereto as Exhibit No.1, and is made a part hereof.

4. The pleadings is this action, together with all exhibits thereto, are made a part of this affidavit by reference, to the same extent as if copied in full herein.

5. Affiant personally attended and was present at, and during the entirety of, the hearing conducted by the Board of Commissioners of the defendant City of Paducah on September 2, 1983, at the time of the adoption by said Board of the resolution annexed as Exhibit "C" to plaintiff's amended complaint, and personally saw and heard all that transpired at said hearing.

6. Said hearing was stenographically reported, at the instance of the defendants, by Lisa A. Kellough (now Lisa A. Dapp), who was and is the official stenographic reporter for Division No. 2 of the McCracken Circuit Court, and who thereafter transcribed her stenographic notes taken at said hearing upon the typewriter. A copy of said transcript of said hearing is annexed hereto and made a part hereof as Exhibit No. 2.

7. Affiant knows of his own personal knowledge that said transcript is a full, correct and complete report of all proceedings had by and before said Board at said hearing of September 2, 1983.

And further affiant sayeth not.

Joseph S. Freeland

Subscribed and sworn to before me by Joseph S. Freeland this 1st day of February, 1984. My commission as Notary Public will expire August 12, 1987.

Notary Public, State of Kentucky at Large

Certificate of Service

I hereby certify that on February 1, 1984, I mailed a copy of the foregoing motion and affidavit to Hon. James W. Utter, defendants' attorney, at his last known address, P.O. Box 2267, Paducah, Kentucky 42001

Attorney for
Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

BELTLINE NEWS & ARCADE CLUB, INC.	)	MOTION FOR SUMMARY JUDGMENT
PLAINTIFF,	)	
VS.	)	Civil Action No. 83-0237 P(J)
CITY OF PADUCAH	)	
DEFENDANTS.	)	

Comes the City of Paducah and moves the Court for Judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, in that the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact in that the City of Paducah is entitled to a judgment as a matter of law.

The City of Paducah herein files its Memorandum in Support of said Motion.

James W. Utter
P.O. Box 2267
Paducah, KY 42001

Attorney for
City of Paducah

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to the Hon. Joseph Freeland, Citizens Bank Building, Paducah, KY 42001, attorney for Beltline News & Arcade Club, Inc., on this 8th day of March, 1984.

James W. Utter

APPENDIX "I"

MEMORANDUM IN SUPPORT OF CITY OF PADUCAH

MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CITY OF PADUCAH

VS. Civil Action No. 83-0217 P(J)

INVESTMENT ENTERTAINMENT, INC.
and SHOWTIME ENTERTAINMENT, INC.

CONSOLIDATED WITH:

INVESTMENT ENTERTAINMENT, INC.

VS. Civil Action No. 783-0208 P(J)

CITY OF PADUCAH, ET AL

MEMORANDUM IN SUPPORT OF CITY OF PADUCAH
MOTION FOR SUMMARY JUDGMENT

Comes the City of Paducah and herein files its Memorandum in Support of its Motion for Summary Judgment:

MAY IT PLEASE THE COURT:

KRS 531.020(1) "A person is guilty of distribution of obscene matter when, having knowledge of its content and character, he:

(a) Sends or causes to be sent into this state for sale of distribution; or

(b) Brings or causes to be brought into this state for sale or distribution; or

(c) In this state, he:

1. Prepares, or
2. Publishes, or
3. Prints, or
4. Exhibits, or
5. Distributes, or

6. Offers to distribute, or
7. Has in his possession with intent to distribute, exhibit or offer to distribute, any obscene matter.

(2) Distribution of obscene matter is a Class B Misdemeanor unless the defendant has in his possession more than one unit of material coming within the provisions of this Chapter, in which case it shall be a Class A Misdemeanor".

In 1974 the Kentucky Courts held that an injunction is a permissible tool to be used against persons violating the then penal statute regulating obscene matter. See Hall v. Commissioner ex rel. Schroering (1974), 505 S.W.2d 166.

Distributing obscene matter within the Commonwealth of Kentucky, is illegal.

> KRS 82.082 states, "(1) A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with provision of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision of statute." "(2) A power or function is in conflict with a statute if it is expressly prohibited by statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes including, but not limited to, the provisions of Chapters 90 and 96." (Emphasis ours).

There is not a comprehensive scheme regulating pornography in the Kentucky Revised Statutes, and the Kentucky Penal Code sections do not preempt the City of Paducah from regulating pornography.

In furtherance of a public purpose the City of Paducah adopted Ordinance No. 83-6-2388 (hereinafter referred to as ordinance) declaring the commercial exploitation of obscene motion picture films and obscene publications to be contrary to the public health, safety and general welfare, and a public nuisance; declaring any place displaying or exhibiting such obscene motion picture films or publications to be a public nuisance per se; making all obscene matter and publications possessed in such places a public nuisance per se; and providing for notice and legal proceedings to abate the same; and providing a procedure for assessment and collection of costs of abatement. (See Exhibit "A", Complaint in file C83-0208-P(J)).

In response to City adopting the above referred ordinance and sending a notice to Investment Entertainment, Inc. that it was under investigation for being in violation of said ordinance (see Exhibit "B" of Investment Entertainment, Inc. Complaint,) Investment Entertainment filed a Complaint in this Court asking for a Declaratory Judgment declaring the Padcah ordinance to be unconstitutional and restraining

the City from proceeding against Investment Entertainment under said ordinance.

Pursuant to said ordinance the City of Paducah conducted a hearing, after which a resolution was adopted by the Board of Commissioners (see Exhibit "C" to Amended Complaint of Investment Entertainment, Inc.) and notified Investment Entertainment, Inc. of the findings of the Board of Commissioners (see Exhibit "D" to Amended Complaint of Investment Entertainment, Inc.).

Investment Entertainment and Showtime admit that the material viewed by the Board of Commissioners is obsence. (Memorandum of plaintiff, page 5).

The ordinance adopted by the City of Paducah is based upon an ordinance upheld in People ex rel. Camil v. Buena Vista Cinema, 57 Cal. App. 3d page 497, 129 Cal. Rptr. 315, (1976). Additionally this ordinance is the similar to the ordinance which was upheld by the United States District Court, Western District of Pennsylvania in Eastern Books v. Bagnoni, 446 F. Supp. 643 (1978) and a similar scheme was upheld in State ex rel. Kidwell v. U.S. Marketing, Idaho, 631 P. 2d 622 (1981).

Section 19-150 of Ordinance No. 83-6-2388 states that the ordinance "establishes procedures for abatement" of the public nuisance, "and for the assessment and collection of costs of abatement which may be incurred by the City incident to such abatement".

The ordinance provides for judicial review prior to any revocation of licenses, placement of liens, or other activity which would interfere with the business activity of the plaintiff. See Section 19-155 (d). Sub-section (g) of Section 19-155 requires notice to be given to the parties involved in the findings of the Board of Commissioners and the proceedings which will be taken to abate the public nuisance.

The judicial proceedings associated with the City of Paducah's ordinance, prior to any activity on behalf of the City to actually close the business or invoke remaining sections of the ordinances, fully protects the rights of the plaintiff to due process, including a judicial determination of obscentity of their materials and does not prohibit the distribution of protected material under the Constitution of the United States or the laws of the Commonwealth of

Kentucky.

On page 3 of their Memorandum, the plaintiff states that the City attempts to impose a lien upon real property of the affected business for all costs, the amount of which is to be determined, not by the court, but by the Board, and provides for the collection of such assessment as other City taxes are collected. This lien is not assessed until a court review has taken place along with the review of the entire proceedings. This provision is not arbitrary or capricious and is subject to court review prior to a lien attaching or other collection efforts by the City.

Plaintiff further takes the position that Section 6 of the Resolution of the Board of Commissioners is unreasonable and violates the Constitutional requirements of due process. Plaintiff is mistaken that Section 6 of the Resolution is unreasonable. Sections 19-152 and 153 of the ordinance set the perimeter for what material constitutes a public nuisance and it will be a duty upon the City, at a hearing before the court, to demonstrate that Sub-sections (A) and (B) of Section 19-153 of the

ordinance exist and that obscene publications constitute all or a prcinciple part of the stock or trade of said business.

In summary, the ordinance is designed to give the City a mechanism for determining when the City will insitute judicial proceedings to abate a public nuisance. In order for the City to prevail before the trial court it will be necessary for the City to show that the conditions set forth in Sections 19-152 and 19-153 exist.

Respectfully submitted,

/s/ James W. Utter
James W. Utter
Attorney at Law
P.O. Box 2267
Paducah, KY 42001
ATTORNEY FOR CITY OF PADUCAH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was mailed, postage prepaid, on this the 8th day of March, 1984 to: Hon. Joseph S. Freeland, Suite 910 Citizens Bank Building, Paducah, KY 42001.

/s/ James W. Utter
James W. Utter

APPENDIX "J"

BRIEF FOR CITY OF PADUCAH, JOE VITERISI
AS MAYOR of the CITY OF PADUCAH,
P.J. GRUMLEY, ROBERT A COLEMAN,
HAROLD (SHORTY) FORD and HAL COLE,
JAMES W. UTTER as CORPORATE COUNSEL;
and THURMAN BAKER as TREASURER Thereof

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NOS. 85-5092/93

CITY OF PADUCAH — PLAINTIFF/APPELLANT

VS.

INVESTMENT ENTERTAINMENT, INC. ET AL — DEFENDANTS/APPELLEES

INVESTMENT ENTERTAINMENT, INC. (85-5092)
BELTLINE NEWS AND ARCADE CLUB (85-5093) — PLAINTIFFS/APPELLEES

VS.

CITY OF PADUCAH, ET AL — DEFENDANTS/APPELLANTS

On appeal from the United States
District Court for the Western
District of Kentucky
at Paducah

BRIEF FOR CITY OF PADUCAH, JOE VITERISI AS MAYOR of the CITY OF PADUCAH, P.J. GRUMLEY, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and HAL COLE, JAMES W. UTTER as CORPORATE COUNSEL; and THURMAN BAKER as TREASURER Thereof

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For the convenience of the Court in citing references to the record, the following procedure shall be used: Investment Entertainment, Inc. v. City of Paducah, Civil Action No. C83-0208-P(J) below, referred to as Investment; City of Paducah

v. Investment Entertainment, Inc., Civil Action No. C83-0217-P(J) below, shall be cited as City and Beltline News and Arcade Club v. City of Paducah, Civil Action No. C83-0237-P(J) below, shall be cited as Beltline.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Is City of Paducah Ordinance No. 83-6-2388 at Sections 19-152 and 19-153 unconsitutuional by declaring any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition; or any and every place in the City of Paducah where obscene film is publicly and repeatedly exhibited or possessed for such purpose of exhibition a public nuisance; and declaring every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this Section to be public nuisances per se.

STATEMENT OF THE CASE

On June 14, 1983, the Board of Commissioners of the City of Paducah adopted Ordinance No. 83-6-2388 "DECLARING THE COMMERCIAL EXPLOITATION OF OBSCENE MOTION PICTURE FILMS AND OBSCENE PUBLICATIONS

TO BE CONTRARY TO THE PUBLIC HEALTH, SAFETY AND GENERAL WELFARE, AND A PUBLIC NUISANCE; DECLARING ANY PLACE DISPLAYING OR EXHIBITING SUCH OBSCENE MOTION PICTURE FILMS OR PUBLICATIONS TO BE A PUBLIC NUISANCE PER SE; MAKING ALL OBSCENE MATTER AND PUBLICATIONS POSSESSED IN SUCH PLACES A PUBLIC NUISANCE PER SE; PROVIDING FOR NOTICE AND LEGAL PROCEDURES TO ABATE THE SAME; AND PROVIDING A PROCEDURE FOR ASSESSMENT AND COLLECTION OF COSTS OF ABATEMENT." (Record - Investment Exhibit "A" to Complaint, pages 1-10; and Beltline Exhibit "A" to Complaint, pages 1-10)

In Section 19-150 of Ordinance No. 83-6-2388, the Board of Commissioners of the City of Paducah found that the

> "commercial exploitation of explicit sexual conduct through the public exhibition of obscene films and the sale of obscene publications, constitutes a debasement and distortion of a sensitive key relationship of human existence, central to family life, community welfare and development of human personality; that such exploitation is indecent and offensive to the senses and to the public morals and interferes with the interest of the public in the quality of life and total community environment, the tome of commerce in the City, property values, and public safety; and that the

> continuation of such activities is detrimental to the best health, safety, convenience, good morals, and general welfare of the City of Paducah and the residents, citizens, inhabitants, and business thereof, and is unlawful and may not be made a subject of a lawful license."

INVESTMENT ENTERTAINMENT, INC.

Pursuant to Section 19.955 of Ordinance No. 83-6-2388, the Board of Commissioners conducted a public hearing on August 3, 1983. The hearing was conducted after a letter was sent to Investment Entertainment, Inc., (hereinafter referred to as "Investment") informing them of the hearing. (Record - Investment: Complaint, Exhibit "B"). At the hearing the Board of Commissioners reviewed materials purchased from Investment by a police officer of the City of Paducah. After reviewing the materials purchased by the police officer the Board of Commissioners adopted a resolution finding that the materials were obscene under the ordinances of the City of Paducah and the statutes of the Commonwealth of Kentucky and that the place of business was operated by Investment. (Record - Investment: Amended Complaint, Exhibit "C").

The resolution further found that the business

is a public nuisance pursuant to Section 19-152 and 19-153 of the Ordinance and ordered the Corporation Counsel pursuant to Section 19-156 of the ordinance to instigate judical proceedings to abate the public nuisance.

Section 19-152 reads as follows:

> "The following are declared to be public nuisances per se:
>
> (a) Any and every place in the City of Paducah where obscene films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition;
> (b) Any and every place in the City of Paducah where an obscene film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition; and
> (c) Any and every obscene film which is publicly exhibited or possessed for such purpose at a place which is a public nuisance under this section.
>
> "From and after service on the theater, or its manager, or acting manager, or person then in charge of such place, of a certified copy of this article and a certified copy of the resolution provided for herein, all monies paid thereafter as admission price to such exhibitions shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance as to which forfeiture will be requested in the judicial proceedings required herein.: (Record - Investment: Exhibit "A" to Complaint, p. 3-4).

Section 19-153 reads as follows:

"(a) The following are declared to be public nuisances per se:

(1) Any and every place of business in the City of Paducah in which obscene publications constitute all of the stock in trade, or a principal part thereof. Where such obscene publications consitute only a part of the stock in trade and are located in a place or places within such business which are capable of demarcation, such place or places consitute the public nuisance which requires abatement; and

(2) Any and every obscene publication possessed at a place which is a public nuisance under this section.

"(b) From and after service on the place or its manager, or action manager, or person then in charge of such place, of a certified copy of this article and a certified copy of the resolution provided for herein, all valuable consideration received for the sale of such obscene publications shall be regarded as being a public nuisance per accidens, as personal property used in conducting and maintaining a declared public nuisance, as to which forfeiture will be requested in the judical proceedings required herein." (Record - Investment: Exhibit "A" to Complaint, p. 4).

On the same day Investment filed a Complaint in the United States District Court for the Western District of Kentucky requesting the Court to issue an injunction prohibiting the City from enforcing Ordinance No. 83-6-2388, contending that portions

of said ordinance were unconstitutional. (Record - Investment: Complaint)

On August 10, 1983, the City of Paducah filed a complaint in the Circuit Court of McCracken County, Kentucky, asking the Circuit Court to determine that the business operated by Investment to be declared a public nuisance, and that an injunction, both temporary and permanent, restraining all persons from maintaining said public nuisance from possessing or publicly exhibiting obscene motion picture films, as defeind in the ordinance, or from selling or possessing for sale obscene publications at any time in the future in the City of Paducah, and such other injunctive relief as the Court may order, and that any obscene publications and obscene films be forefeited as contraband. (Record - City: Complaint).

On August 17, 1983, Investment filed a petition for removal to the United States District Court. On October 3, 1983, the District Court consolidated the two actions into Civil Action No. 83-0209P(J). (Record - Investment and City : Order dated 10-3-83).

BELTLINE NEWS AND ARCADE CLUB

As to the appellee Beltline, the proceedings were similar to Investment except that the District Court found that there was not diversity of citizenship and remanded the City's complaint against Beltline to the McCracken Circuit Court, where said action is still pending.

In both actions, all of the parties filed motions for summary judgment as to the constitutionality of ordinance No. 83-6-2388. On January 5, 1985, the Hon. Edward H. Johnstone, Judge of the United States District Court, entered a Memorandum Opinion in Investment Entertainment v. City of Paducah concluding that:

> "On the other hand, non-obscene materials are entitled to great protection, and therein lies the danger of Ordinance No. 83-6-2388. By going beyond the obscene materials themselves and focusing on the place where the obscene materials are sold or exhibited, the ordinance improperly intrudes upon protected expression. Because of the focus on places rather than materials, the Court finds that Section 19-152(A) and (B) and Section 19-153(A) are unconstitutional." (Record - Investment: Memorandum Opinion of 1-5-85, page 10).

A memorandum of opinion entered January 7, 1985, in Beltline referred to and adopted the memorandum opinion in the Investment case. (Record - Beltline: Memorandum Opinion of 1-3-85).

On January 7, 1985, the District Court entered the following Order:

> "For the reasons given in the memorandum opinion accompanying this order,
>
> "IT IS ORDERED that the motion for summary judgment filed by the plaintiff, Beltline News & Arcade Club, Inc., is SUSTAINED.
>
> "IT IS FURTHER ORDERED that
>
> "1. Sections 19-152 and 19-153 of Ordinance No. 83-6-2388 of the City of Paducah are declared to be in violation of the Constitution of the United States of American, and;
>
> "2. The defendants are permanently enjoined from utilizing the provisions of Sections 19-152 and 19-153, Ordinance No. 83-6-2388, to proceed against the plaintiff.
>
> "This is a final and appealable order and there is no just reason for delay."

On January 8, 1985, the District Court entered the following Order:

> "For the reasons given in the memorandum opinion accompanying this order,
>
> "IT IS ORDERED that the motion for summary judgment filed on behalf of Investment Entertainment, Inc. and Showtime Entertainment, Inc. is SUSTAINED.

"IT IS FURTHER ORDERED that

"1. Sections 19-152 and 19-153 of Ordinance No. 83-6-2388 of the City of Paducah are declared to be in violation of the Constitution of the United States of America, and;

"2. The defendants are permanently enjoined from utilizing the provisions of Sections 19-152 and 19-153, Ordinance No. 83-6-2388, to proceed against Investment Entertainment, Inc.

"This is a final and appealable order and there is no just reason for delay."

On January 29, 1985, the City of Paducah filed notices of appeal in both the Investment case and the Beltline case, which appeals were consolidated by Order of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

KRS 531.020(1) "A person is guilty of distribution of obscene matter when, having knowledge of its content and character, he:

(a) Sends or causes to be sent into this state for sale of distribution; or

(b) Brings or causes to be brought into this state for sale or distribution; or

(c) In this state, he:

1. Prepares, or
2. Publishes, or
3. Prints, or
4. Exhibits, or
5. Distributes, or
6. Offers to distribute, or
7. Has in his possession with intent to distribute, exhibit or offer to distribute, any obscene matter.

(2) Distribution of obscene matter is a Class B Misdemeanor unless the defendant has in his possession more than one unit of material coming within the provisions of this Chapter, in which case it shall be a Class A Misdemeanor".

Pornography is and has been illegal in the State of Kentucky, and it is not protected by the First Amendment to the Constitution of the United States of America. See Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 83 S.Ct. 631 (1963). The problem of enforcing criminal statutes, the time involved in trials and appeals on criminal prosecutions, and the openness of businesses which deal in this illegal product are apparent.

In 1974 the Kentucky Court held that an injunction is a permissable tool to be used against in regulating obscene matter. See Hall v. Commonwealth ex rel. Schroering (1974), 505 S.W.2d 166.

In furtherance of such public purpose the City of Paducah adopted Ordinance No. 83-6-2388 (hereinafter referred to as ordinance) declaring the commercial exploitation of obscene motion picture films and obscene publications to be contrary to the public health, safety and general welfare, and a public nuisance; de-

any place displaying or exhibiting such obscene motion picture films or publications to be a public nuisance per se; making all obscene matter and publications possessed in such places a public nuisance per se; and providing for notice and legal proceedings to abate the same; and providing a procedure for assessment and collection of costs of abatement.

The City of Paducah needs a means of controlling illegal, obscene material within the city limits, and the ordinance in question goes no further than is necessary to control obscene material. To insure that only obscene material and distributors of such are involved, a review is held by the City Commission which consists of the elected officials of the city, and a cross-section of city residents. Additionally, their findings are not implemented in any manner against the alleged dealer or distributor of obscene material, but rather, a Circuit Court action if filed in which the Circuit Judge must find that the person regularly deals in obscene material and has a substantial portion in his stock and trade as obscene material. Only after judicial review are the sanctions of the ordinance implemented.

Investment and Beltline admit that the material viewed by the Board of Commissioners is obscene. (Record - Investment: Memorandum Opinion, p.5).

Section 19-150 of the Ordinance states that the ordinance "establishes procedures for abatement" of the public nuisance, "and for the assessment and collection of costs of abatement which may be incurred by the City incident to such abatement".

The ordinance provides for judicial review prior to any revocation of licenses, placement of liens, or other activity which would interfere with the business activity of the plaintiff. (Record - Investment: Exhibit "A" to Complaint, p. 7)

The judicial proceedings associated with the City of Paducah's ordinance, prior to any activity on behalf of the City to actually close the business or invoke the remaining sections of the ordinance, fully protect the rights of the plaintiff to due process, including a judicial determination of obscenity of their materials and does not prohibit the distribution of protected material under the Constitution of the United States or the laws of the Commonwealth of Kentucky. (Record - City: Memorandum Opinion, p. 6).

The procedure used by the City of Paducah has been upheld by the Supreme Court. The leading case of State ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Idaho, 1981), Appeal dismissed, U.S. Marketing, Inc. v. Idaho, (1982), 455 U.S. 1009, 71 L.Ed.2d 878, 102 S.Ct. 1649, the Idaho Court held that

> "While much has been written on procedural requirements in cases involving 'prior restraint,' very little has been written to define the phrase. To merely label something unconsitutional as a prior restraint is question begging at its best, especially if no analytical effort is made to determine whether the regulation is indeed a prior restraint on free speech.
>
> "...By way of example, if a book seller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint upon his book-selling activities. If the same book seller is convicted of the crime of distributing obscene materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it has that effect.
>
> "...Like a tax sale, the forfeiture is directed strictly at property, apart from the content of any expression contained therein. And like imprisonment for criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The

> legislator could just as easily have imposed a fine or other property-related penalty. Instead, the legislator has chosen to punish the violator by temporarily depriving him of property which was used in committing the violation."

Judge Johnstone is concerned that by focusing on places of sale and exhibition, rather than merely upon material sold or exhibited, the ordinance intrudes upon protected speech. Specifically, it prevents an entire place from disseminating constituionally protected, non-obscene materials, simply because the place has sold or has exhibited obscene materials in the past. The Court went on to say that "Moreover, because the ordinance allows the entire business to be declared a publis nuisance, it encourages a business person to steer wide of the danger of avoiding questionable but nonetheless protected films and publications."

The decisions a businessman would make under this ordinance are considerably less than he is required to make under Kentucky's Penal Code. Under Kentucky's Penal Code a person can be imprisoned or fined if he has in his possession with the intent to distribute, exhibit or offer to distribute, one piece of obscene matter. For two pieces of obscene matter

it becomes a Class A Misdemeanor subject being jailed for a period of one year. (See KRS 531.020)

Whereas, the city oridinance requires public exhibition as a regular course of business or publicly and repeatedly exhibiting or possessing for the purpose of exhibition, obscene material, or where obscene publication contitutes all of the stock or trade or a principal part thereof. The requirements of the ordinance are much less restricting than the state statute, which the merchant must consider in making the decision on the "line between protected and unprotected speech (which) is dim and uncertain".

The businessman must avoid the protected but questionable matters in an effort to comply with the Kentucky Oscenity Statutes long before he has concern with the City of Paducah Ordinance. Further, innocent or negligent exhibitions do not establish a violation inasmuch as the continuing course of conduct must be presented before the ordinance comes into play. As the United States Supreme Court said in Kingsley Books, Inc. v. Brown, 354 U.S. 436 at 441:

> "We need not linger on the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against dissmenation of pornography. It is not for this Court thus to limit the state in resorting to various weapons in the armory of the law. Whether prescribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislator's range of choice."

The District Judge relied heavily on a case of Universal Amusement Co. v. Vance, 587 F.2d 159, 165-166 (5th Cir. 1978), (en banc) Affirmed, Vance v. Universal Amusement Co., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

The Supreme Court said in Vance v. Universal Co., Inc.:

> "The Court of Appeals was quite correct in including both (a) that the regulation of community activities such as exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance, and (b) that the burden of supporting an injunction against future exhibition is even heavier than the burden of justifying the imposition of criminal sanctions for past commissions."

The Court went on to say, "Contrary to appellant's second argument, the Court of Appeals did not

hold that there can never be a valid prior restraint on community activity. The Court of Appeals simply held that these Texas statutes were procedurally defective and that they authorized prior restraints that were more honorous than is permissable under Freedman v. Maryland Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)".

In Southeastern Promotions Ltd. V. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), the Supreme Court said that "We held in Freedman" (Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965)), "and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instigating judicial proceedings and proving that the material is unprotected must rest on the censor. Second, any restraint prior to judical review can be imposed only for a specified brief period and only for the purpose of reserving the status quo. Third, a prompt final judicial determination must be assured."

The ordinance of the City of Paducah meets all the tests set out in Southeastern Promotions; (1) the ordinance calls for the city to initiate the court

action against the alleged distributor of obscene material, (2) it has no restraint prior to judicial review, and (3) the ordinance calls for prompt filing of an action in the state court system.

In the case of Cahalan v. Diversified Theatrical Corp. , 59 Mich.App., 223, 229 N.W.2d 389 (1975) reversed on other grounds 396 Mich. 244, 240 N.W.2d 460, the Michigan Court upheld a statutory provision authorizing padlocking of premises, as a nuisance, used for the purpose of lewdness and rejected the defendant's contention that such provision was unconsitutional as imposing a prior restraint on materials presumatively protected by the First Amendment. The Michigan Court noted that a nuisance was found to exist in the showing of obscene films and that the statutory sanctions were imposed after a full judicial hearing because of past obscene exhibitions and not because of any possible future exhibitions, and the closure authorized by the statute did not restrict the right of the defendant to lawfully exhibit films not yet declared to be obscene, but simply prohibited defendants from doing so in particular buildings.

In the case of State ex. rel. Ewing v. "With-

out a Stitch", 37 Ohio St.2d 95, 66 Ohio Ops.2d 223, 307 N.E.2d 911 (1974) appeal dismissed 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649, the Ohio Court held that the State's Nuisance Statutes prescribed a constitutionally permissible method of controlling the exhibition of obscene films, since the statutes included a definition of nuisance as a place where obscene films were shown, and the provisions mandating that an abatement order close the place in and on which a nuisance was maintained for one year.

California Courts also upheld a nuisance closure statute in the case of People ex rel. Sorenson v. Randolph, 99 Cal.App. 183, 160 Cal.Rpt. 69, holding that an order or abatement closing the theater did not infringe upon the owner's First Amendment rights as a prior restraint.

CONCLUSION

The City of Paducah, Joe Viterisi, as Mayor of the City of Paducah, P J Grumley, Robert Coleman, Harold (Shorty) Ford and Hal Cole as Commissioners of the City of Paducah, James W. Utter as Corporation Counsel, and Thurman Baker as Treasurer of the City of Paducah, respectfully submit to the Court that the

District Judge misinterpreted Ordinance No. 83-6-2388 in finding that the Ordinance impermissibly punishes non-obscene, protected speech. The appellants further respectfully submit to the Court that the Ordinance of the City of Paducah as adopted is constitutional and a valid weapon in fighting non-protected, illegal obscenity and does not infringe on the constituionally protected rights of the appellees. The closure provisions contained in the Ordinance are a valid exercise of legislative discretion in controlling non-protected obscenity, and the decisions a business person must make to avoid non-protected publications is less than he must make in interpreting the Kentucky Penal Statutes. The appellants further respectfully submit to the Court that they should accept the reasoning of the Idaho Court in Kidwell, 631 P.2d 622, vacate the Orders of the District Court and remand these cases to the District Court for a trial on the issue of whether or not the appellees come under tne sanctions of the City's ordinances.

Respectfully submitted,

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